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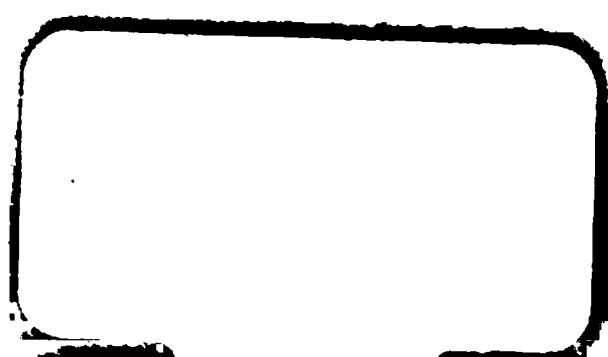
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TREATISE
ON THE
PRINCIPLES AND PRACTICE
OF THE
HIGH COURT OF CHANCERY,

UNDER THE FOLLOWING HEADS:

I. COMMON LAW JURISDICTION.
II. EQUITY JURISDICTION.

III. STATUTORY JURISDICTION.
IV. SPECIALLY DELEGATED JURIS-
DICTION.

Et silectis venis abstrusum excuderet ignem.

BY HENRY MADDOCK, ESQ.

OF LINCOLN'S INN, BARRISTER AT LAW.

THIRD AMERICAN,

FROM THE LAST LONDON EDITION.

With the addition of the

PRINCIPAL AMERICAN DECISIONS IN CHANCERY,

UPON THE PLAN OF THE ORIGINAL WORK.

BY THOMAS HUNTINGTON, ESQ.

COUNSELLOR AT LAW.

IN TWO VOLUMES.

VOL. I.

HARTFORD,
OLIVER D. COOKE & CO.

1827.

DISTRICT OF CONNECTICUT, ss.

L. S. **BE IT REMEMBERED,** That on the nineteenth day of June, in the fifty-first year of the Independence of the United States of America, OLIVER D. COOKE & Co. of the said District, have deposited in this office the title of a Book, the right whereof they claim as Proprietors, in the words following, to wit: "A treatise on the principles and practice of the High Court of Chancery, under the following heads: 1. Common Law Jurisdiction. 2. Equity Jurisdiction. 3. Statutory Jurisdiction. 4. Specially delegated Jurisdiction. *Et silicis venis abstrusum excuderet ignem.* By Henry Maddock, Esq. of Lincoln's Inn, Barrister at Law. With the addition of the principal American decisions in Chancery, upon the plan of the original work. By Thomas Huntington, Esq. Counsellor at Law."—In conformity to the act of Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of Maps, Charts and Books, to the authors and proprietors of such copies, during the times therein mentioned."—And also to the act entitled, "An act supplementary to an act, entitled "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned," and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

JNO. BEACH, *Clerk of the District of Connecticut.*

A true copy of Record, examined and sealed by me,

JNO. BEACH, *Clerk of the District of Connecticut.*

ADVERTISEMENT

TO THE SECOND EDITION.

A SECOND Edition of this Work being in request, I have made such alterations and additions as my reading and reflection have suggested since the publication of the First Edition. The additions are numerous, consisting nearly of *three hundred Pages*, and the Index has been much enlarged.

H. M.

**9, New Boswell Court,
Lincoln's-Inn-Fields.**

TO

THE RIGHT HONOURABLE

JOHN LORD ELDON,

LORD HIGH CHANCELLOR OF THE UNITED KINGDOM,

THE FOLLOWING TREATISE,

IS

RESPECTFULLY INSCRIBED:

PREFACE

TO THE FIRST EDITION.

THE following work is the result of the leisure hours of several years. Desirous, from duty and inclination, to acquaint myself with the Principles and Practice of the Court of Chancery, I resolved, early in my Professional Studies, to read all the Chancery Reports of reputation and authority, beginning with the most modern, and concluding with the most ancient. This course of reading I pursued always with my pen in my hand, extracting the Principles and the Practice as I read, and arranging *them under such heads as seemed the most natural and convenient*. This is the secret history of the design and execution of this Work, which was originally intended only for private use. I might have taken an easier course ; I might have applied myself to the Treatises, several of them able ones, which have been written on many of the subjects of the following Work, and have made a compilation of compilations ; but I preferred seeing and judging for myself.

To collect a multiplicity of particulars under general heads, and to refer a variety of operations to their common principle, has been justly observed to be the object of science ; but if it were true, that the Chancellor, in the exercise of his Jurisdiction, acted only, as is vulgarly supposed, according to an unbounded discretion, *nunc severius, nunc mitius agendo prout viderint expedire*, it would be a folly to attempt to systematise the doctrines of the Chancery ; for what would be the use of principles if they were of so fluctuating a nature that Chancellors might regard or disregard them as they thought proper ? In respect to Costs, the Court does, indeed, from necessity, use a discretion, and it is the most painful part of its duty ; but in other respects, the system of our Courts of Equity is a laboured, connected system, governed by established Rules, and bound down by Precedents, from which the Judges do not depart, although the reason of some of them may, perhaps, be liable to objection.

In cases of *Trust* and of *Fraud*, Chancellors, it is true, have been unwilling to set bounds to their Jurisdiction, and say *how far*, in cases of that description, they will go ; yet so far as they *have gone*, the *principles* laid down are binding authority.

"*There are*," says Lord Redesdale, "*certain principles on which Courts of Equity act, which are very well settled. The Cases which occur are various ; but they are decided on fixed principles. Courts of Equity have in this respect no more discretionary power than Courts of Law. They decide new Cases as they arise by the Principles on which former Cases have been decided, and may thus illustrate or enlarge the operation of those principles ; but the principles are as fixed and certain as the principles on which the Courts of Common Law proceed.*" (a.)

If Chancellors were not guided by Precedent, there ought to be fifty Courts of Chancery. A decided point is now never discussed ; but if Precedents were of no avail, each case must be argued on first principles, and the affairs of mankind could not be carried on.

It seldom happens that a case comes before a Chancellor unaffected by previous decision :—one I remember before a great Judge, and he begins his decision by saying, "*Having had doubts upon this Will for twenty years, &c.*" Had there been cases in point, that eminent man, equal to any, and superior to most of his predecessors, would have decided in five minutes what he had been twenty years doubting upon.

Lord Nottingham, disapproving of some cases cited to him, said, with some warmth, "*that he would alter the Law in that point*" (b) : but Lord Talbot, when this saying was mentioned to him, observed, "I do not see how anything less than an Act of Parliament can alter the Law" (c). "If," said his Lordship, "the Law, as it now stands, be thought inconvenient, it will be a good reason for the Legislature to alter it ; but till that is done, what is Law at present must take place" (d).

In the case of *Fry and Porter* (e), Lord Ch. J. Vaughan, who was called in to the assistance of the Chancellor, said, "he wondered to hear of citing of Precedents in matter of Equity ; for if there be Equity in a case, that Equity is a universal truth, and there can be no Precedent in it ; so that in any Precedent that can be produced, if it be the same with this Case, the Reason and Equity is the same in itself ; and if the Precedent be not the same with this Case, it is not to be cited, being not to that purpose :—" but the Lord Keeper Bridgman vindicated the use of Precedents. "Certainly," says he, "Precedents are very necessary and useful to us, for in them we may find the reason of

(a) *Bond v. Hopkins*, 1 Sch. & Lefr. 428, 9. (c) *Heard v. Stamford*, 3 P. Wms. 411.

(b) *Freeman v. Goodham*, Ch. Rep. 295. (d) *Heard v. Stamford*, 3 P. Wms. 411. (e) *Mod. p. 300. Edit. by Lear.*

the Equity to guide us, and besides, the authority of those who made them is much to be regarded. We shall suppose they did it upon great consideration, and weighing of the matter; and it would be very strange, and very ill, if we should disturb and set aside what has been the course for a long series of time and ages. *L. C. Baron Hale* said, "I know there is no intrinsical difference in cases by Precedents; but there is a great difference in a case wherein a Man is to make, and where a Man sees, (and is to follow) a Precedent: in one case a Man is more strictly bound up, but in the other he may take a greater liberty and latitude; for if a Man be in doubt, in *æquilibrio*, concerning a case, whether it be equitable or no, in prudence he will determine according as the Precedents have been, especially if they have been made by Men of good authority for learning, &c. and have been continued or pursued."

One is a little surprised at an expression of *Lord Northington's* upon a Precedent quoted before him, a Decision of *Lord Hardwicke*. "It is," said he, "an authority for the Master of the Rolls. But I feel only one authority, that of the *House of Lords*, which is a superior Court, no other authority has any influence on my judgment." (f)

He is the only Chancellor since the Revolution who has used such language.

It was the expressed opinion of *Lord Macclesfield* never to shake any settled Resolution touching Property, or the Title of Land; it being for the common good that these should be certain and known, however ill grounded the first Resolution might be. (g)

As to inconveniences, if the Law is clear, they afford no argument of weight with the Judge. The Legislature only can remedy them; they are properly considered only in a case where the Court entertains doubts. (h)

Often is a Judge, even in a Court of Equity, compelled to exclaim, "I yield to the authority, but not to the reason of the Cases." (i)

It was the opinion of *Lord Thurlow*, that, "for the purpose of securing Property, and the due administration of Justice in a free Country, Judges ought to abide constantly by real Principles, and by such beneficial Rules as may afford some reasonable judgment, without applying to a superior tribunal." (k)

No man criticised more upon Rules laid down by other Judges

(f) *Attorney-General v. Tyndall*, *Ambl.* 616.

Since the first Edition of this Work, the Judgments of Lord Northington have been published from his MSS. The Editor observes, that no such expressions are to be found in the Judgment in this Case, nor in the *Sewell*

MSS. 2 Eden, 213.

(g) *Wagstaff v. Wagstaff*, 2 P. Wms. 258, 9.

(h) *Pike v. Hoare*, *Ambl.* 430; and see what is said in *Sparrow v. Hardcastle*, *Ambl.* 227; and in 2 Atk. 560.

(i) See 2 Bro. C. C. 80.

(k) 1 Bro. C. C. 465.

than *Lord Thurlow* ; but no man was more rigid in observing them when he could once deduce them. (1) The same observation may be made of *Lord Eldon*. Nobody criticises judgments more, or sees more clearly the wisdom or the errors of his predecessors ; but no one has adhered more pertinaciously to established Rules.

From many considerations it might be expected that the Court of Chancery would exhibit an almost perfect system. The Chancellor always is, and must be, of transcendent talent. His Decisions are not necessarily instantaneous—he may take what time he pleases to decide ; no hasty, off hand, *nisi prius* opinion, is required of him. Such are the subjects upon which he decides, that all party prejudices, and passions and influence, are excluded. They are only questions of *Property* that come before the Chancellor. No State Prosecutions, no Treasons, no Libels, no Misdemeanors ; in a word, no question which involves *Punishment*, or where *Damages* are sought, are brought before the Chancellor's Tribunal ; so that his Decisions are subject to no undue bias of any kind. There was, to be sure, a time, when the Court wrote to the Chancellor, in what way to decide ; but this abuse has long, very long, been at an end. No Science will ever arrive at perfection where it is the Interest of the Professors to keep it imperfect ; but what Interest can our Chancellors have in keeping the Chancery System imperfect, and to what is to be ascribed such a variety of Distinctions ?

“ General Rules are easily framed, but the application of them creates considerable difficulty in all cases in which the Rule is not sufficiently comprehensive to meet each circumstance which may enter into and affect the particular case ;” hence, distinctions unavoidably arise.

Some of these niceties have arisen from the pride of Intellect ;—that pride which excites minds to triumph over their Predecessors in Office—to show their errors, and establish wiser systems than those they constructed. But while each Chancellor thinks for himself, they seem to forget mankind ; they show themselves wiser, perhaps, than those who went before them, “ *plus sages que les sages*,” but by their differences they bewilder the Suitor, who only wants some certain Rule on which he may rely.

Another cause of the magnitude of the Chancery System arises, in a great degree, from what is, certainly, a noble error, the humanity of the Chancellors. To help an individual hardship, a general inconvenience is often occasioned ; the Law is strained, and ingenious distinctions are created.

I flatter myself this Work will prove useful to all ranks of the Profession, and more especially to the young Student.

We have, it is true, detached Treatises on equitable subjects,

(1) See what is said by Lord Alvanley in *Hinchliffe v. Hinchliffe*, 3 Ves. 527.

and also the Reports of the Proceedings in Courts of Equity, which, certainly, are so many rich Mines of equitable Principles; but is it to be expected that a young Student, warm with the fascinating charms of the Classics, and the generous Studies of an University, should read with any patience a variety of Treatises, and pore over a long series of voluminous Reports, before he has imbibed some elementary Principles on the subject, and obtained some sort of a clue to the vast labyrinth before him? *Blackstone* in his Commentaries alludes occasionally to our Courts of Equity; but his treatment of the Subject, though much to be admired, so far as it extends, must yet be allowed to afford a very trifling knowledge of the Principles of Equity. It is, in truth, one of the most deficient parts of that excellent Work. He has given an admirable view of part of the laws of England, and particularly of the Common Law; but we look in vain into that unrivalled Work for any detailed information relative to the Principles and Doctrines of the Court of Chancery. What little *Blackstone* there says of the Court of Chancery is sketched with admirable spirit and correctness; and fortunate had it been, if such a genius had been applied to analyze and unfold the Principles of that Court.

It is very surprising that this should be the first attempt that has been made to reduce into one comprehensive view all the doctrines of the Court of Chancery.

Lord Nottingham, who has been called, “the Father of Equity,” appears to have planned, and partly to have executed, a Work of this description; but he lived in the infancy of the Science.

It seems to have been the general opinion that such a Work was impracticable, *opus desperatum*; but the more we reflect, the more we shall be convinced that the Doctrines of the Court of Chancery are reducible into System. Before the time of *Sir Matthew Hale*, the Common Law was considered as incapable of being reduced into System, by reason, it was said, “of the indigestedness of it, and the multiplicity of the Cases;” but *Sir Matthew Hale* was not of that opinion, and he immediately began his famous *Analysis*, and fully showed he had reason to be so. On the foundation of that Production, *Blackstone* built his immortal Work. In like manner, it seems to me, that all the proceedings in the Court of Chancery are referrible to some fixed principles, and are as capable of being treated of systematically as the Common Law is. *Lord Nottingham* observes of *Sir Matthew Hale*, that he looked upon Equity as part of the Common Law, and one of the grounds of it, and therefore, as near as he could, he did always reduce it to certain Rules and Principles, that men might study it as a Science, and not think the administration of it had any thing arbitrary in it. (m)

(m) See Burnet's Life and Death of Hale, p. 176. The great man mentioned by the Bishop in page 172, was Lord Nottingham.

The *Lex Prætoria* of Ch. Baron Gilbert, of which I have a Copy in manuscript ; the *Treatise of Equity* by Mr. Ballow, and the *Principles of Equity* by Lord Kaims, have each their respective merits, but neither of them exhibits that arrangement and comprehension which the subject seems to deserve and require.

The *Lex Prætoria* is a very confined and unfinished sketch.

The Work entitled *Principles of Equity* is too theoretical, and founded more on Scotch Law than on the decisions of English Courts of Equity, and has never been looked up to as an authority. The *Treatise on Equity* is a masterly Work, and possesses too many excellencies to be hurt by any little criticism : but with all its merits, it must be confessed to be not sufficiently comprehensive or methodical, and like the other Works I have noticed, unavoidably deficient in the information to be gathered from the Modern Reports, by which the Doctrines of the Court of Chancery have been so much illustrated and enlarged. *Mr. Fonblanque*, the Editor of the last-mentioned Work, has, up to the period at which he wrote, remedied one of its defects, by his references to the modern Decisions ; but his Notes, learned, useful and able as they are, are unavoidably desultory and unconnected, and have rendered still more glaring the remaining deficiencies of the original Work. If the Editor's delicacy had permitted him to re-cast the whole Treatise, we should, probably have been furnished with a complete Work, such as might be expected from his great abilities, and long experience.

From the plan on which this Treatise was composed, I have had occasion to borrow but little from the Works I have mentioned ; none at all from Lord *Kaims's* Work. In those few instances where I have received assistance, I have acknowledged the obligation.

The first object of every Student ought to be to study the Elements of the doctrines of his Art, and in almost all the Sciences such Works are to be found. "Whosoever," says *Lord Chancellor Fortescue* (n) "desires to get a competent understanding in any faculty or Science, must by all means be well instructed in the *principles* thereof : for by reasoning from the principles which are universally acknowledged and uncontested, we arrive at length at the final causes of things ; so that whoever is ignorant of these three, the Principles, Causes, and Elements of any Science, must needs be fatally ignorant of the Science itself ; on the other hand, when these are known, the Science itself is known too, at least in general and in the main, though not distinctly and completely." All those vast frightful Volumes, termed Reports, would no longer appal the Student, if he had but a guide in the mighty maze before him ; for Cases are but corollaries from first principles ; they are proper enough, nay

(n) Fortescue de Laud. Ang. Ch. 8.

indispensable, as Works for occasional reference, but are wholly improper to be studied as Elementary Books. Without method, though full of various knowledge, to use the expression of the Institutes, "they cause the Student either wholly to abandon his studies, or bring him late through a series of labours to that knowledge which he might otherwise have attained with ease and expedition." (o)

Unless the principles of Chancery Science are mastered, it requires incessant application, and a stupendous memory to retain every particular Decision; but when once the principles are thoroughly acquired, the application needs not be so incessant, and the memory, without any extraordinary effort, will easily store up and recall, as occasion may require, every important Case which has been presented to the mind either by reading or experience.

"I am inclined to believe," says an accurate observer of the human mind, "both from a theoretical view of the subject, and from my own observations, as far as they have reached, that if we wish to fix the particulars of our knowledge very permanently in the memory, the most effectual way of doing it is to refer them to general principles." (p)

In the execution of this Work I have confined myself to the consideration of matters which exclusively fall under the cognizance of the Chancellor, or concurrently with other Courts of Equity. It is true, that a question of mere Law is often discussed in Courts of Equity, and this is frequently necessary, before equitable relief can be administered; but whenever such points arise, the Chancellor follows the Law, and such points are determined in conformity with the Decisions of the Common Law Courts. But though such questions do often collaterally arise, and almost every point of Law is occasionally brought into discussion, and our Equity Reports abound with them, yet I think it unnecessary to detail the principles of the Decisions of the Chancellor on points of Law, and this for several reasons: Because, though the opinion of the Chancellor, even on a point of Law, must always be looked up to with great respect, yet, certainly, such points are decided with more of weight in the Common Law Courts, since the Judges are numerous, and their studies have been peculiarly devoted to the learning on such subjects. The opinion of the Chancellor on a point of Common Law cannot be put in competition with an express Decision of the Common Law Courts on the same subject. It is therefore to the Decisions of the Common Law Courts that reference

(o) Instit. Lib. 1. Tit. 1. s. 2.

I cannot here deny myself the pleasure of remarking how greatly the profession is indebted to Mr. Vesey, jun. for his Reports of Cases in Chancery, for a se-

ries of years. They are valuable for the judgment shown in the selection, and for their fidelity.

(p) Stewart's Elements of the Philosophy of the Human Mind, p. 225.

should be made on such points. Indeed, if the Chancellor has any doubt on a mere point of Law, if the point has not been clearly settled by Common Law Determinations, it is his common habit to refer to a Court of Common Law for its opinion; and though, strictly speaking, the Chancellor is not bound to act upon the answer of a Court of Law, (q) yet that opinion always governs the Chancellor; a plain proof this of its pre-eminent authority in Common Law Science.

Of questions of Law, the Judges are the sworn and proper Judges. "If," says the *Lord Keeper Bridgman*, who had called some of the Judges to his assistance, "I were of another opinion, yet I would be bound by the opinion of my Lords the Judges." (r)

In a case in which *Lord Hardwicke* had received the opinion of a Court of Common Law on a case sent by him, he observed, "I shall not send it again to Law; and however I might have doubted, if I had sat in the King's Bench, on the argument in point of Law, yet I shall not depart from the opinion of those learned Judges." (s)

And in another Case, where the Chancellor had called upon some of the Judges to assist him in a case before the Court, he observes, "If I had even now a doubt concerning it, I should have held myself bound by the opinion of the Judges as a matter within their conusance, in like manner as if I had sent this to be tried at Law, in which case, the Court always decrees consequentially to the Trial." (t) A plain proof this, of the binding effect of the Decisions of Courts of Common Law upon the Chancellor.

To introduce questions of pure Law in a Treatise on Equity, renders the Work incapable of system, confused, and immethodical, and is an amalgamation which tends only to embarrass the reader. It is, I believe, one of the principal causes that has obstructed the reduction of Equity Principles to system and method. I have, therefore, as much as possible, avoided any notice of Common Law doctrines in the ensuing Work, and must refer my readers to Common Law writers for such learning.

I originally intended to prefix to this Work, *An Historical View of the Rise and Progress of the Chancellor's Authority*; conceiving it to be a natural and proper introduction. The inquiry cost me great Labour, and much antiquarian research; but as I had mixed with it the characters of the Chancellors; the anecdotes concerning them, connected with the administration of Justice; the various disputes respecting the Chancery; the progress from arbitrary discretion to fixed Rules; a vindication of the Jurisdiction from the cavils of various Writers; a suggestion of pos-

(q) 14 Ves. 32.

(r) Fry v. Porter, 1 Mod. 313.

(s) Ekins v. Macklish, Ambl. 185.

(t) See *Chesterfield v. Janson*, 2 Ves. 153; and what Lord Eldon says in *Dashwood v. Peyton*, 18 Ves. 97

sible improvements, and other matters incidentally relating to it, my materials extended so much beyond what I originally intended, (a short dissertation) that they amounted to a Volume ; and as inquiries of this description are suitable only to the taste of a few, and the Publication would have very considerably increased the size and price of the Work, without contributing much to its utility, I dropped this part of my design, though not without some reluctance, as the subject was a favourite one.

Many persons have conceived a prejudice against the Court of Chancery, and have considered it as an huge overgrown excrescence, which called for the pruning knife of the Legislature ; but this is the language of presuming ignorance. Some defects it has ; the machinery of the great System has, till lately, been too slow in its motions : but after contemplating it in all its parts, visiting its foundations, and witnessing its benefits, it is, in my humble apprehension, a most beneficent Judicature, and of unparalleled wisdom and utility ; exhibiting, occasionally, all the subtlety of the disciples of Loyola, but employing it to aid the sacred cause of Justice.

To some, the numerous citations of Cases may seem like an ostentation of reading ; but every professional Man is fully aware, that the greatest merit in a legal Writer will not compensate for the want of Cases in support of his positions. In an English Court of Justice, the veriest dolt that ever stammered a sentence would be more attended to with a Case in point, than Cicero, with all his eloquence, unsupported by authorities ; and it is fit it should be so, for how, otherwise, can Law be, what it ought to be, a certain *Rule of Conduct*.

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BOOK I.

ALL matters determinable in the Court of Chancery may be classed under one or other of the following heads :

- I. THE COMMON LAW JURISDICTION.
 - II. THE EQUITY JURISDICTION.
 - III. THE STATUTORY JURISDICTION.
 - IV. THE SPECIALLY DELEGATED JURISDICTION.
-

COMMON LAW JURISDICTION OF THE CHANCELLOR.

THE Chancellor is, by the Common Law, invested with various powers. He is a privy counsellor and prolocutor of the House of Lords, as well as patron of the King's livings, under the value of *twenty marks per annum in the King's [2* books(a)]. He is also, by the Common Law, a conservator of

(a) See 38 Edw. 3. 3. and 13. Edw. 4. 3. 11 Hen. 4. 80. F. N. B. 83 K. 4to. ed. It appears from the Rolls of Parliament in the time of Edw. 3, that it had previously been the usage for the Chancellors to give all the King's livings, taxed (by the subsidy assessments) at twenty marks, or under, to the clerks, who were then actually clerici or clergymen, who had long laboured in the court of Chancery; but that the bishop of Lincoln, when he was chancellor, had given such livings to his own and other clerks, contrary to the pleasure of the King, and the ancient usage, and therefore it was recommended to the King by the Council, to command the Chancellor to give such livings only to the Clerks of Chancery, the Exchequer, and the other two benches or courts at Westminster-

Hall, 4 Edw. 3. No. 51, quot. Gibson's Codex, 764. But since the new valuation of benefices, or the King's books in the time of Henry the Eighth, and the clerks ceased to be in orders, the Chancellor has had the absolute disposal of all the King's livings, even where the presentation devolves to the Crown by lapse, of the value of twenty pounds a year, or under, in the King's books. It does not appear how this enlarged patronage was obtained by the Chancellor, but it was probably by private grant of the Crown, from a consideration that the twenty marks in the time of Edward the third were equivalent to twenty pounds in the time of Henry the Eighth, Gibs. 764. 1 Burn. Eccl. Law, 129, quot. 3. vol. Black. Com. p. 47, in note by Mr. Christian.

the peace, and may award precepts and take recognizances for the peace. Parliament is summoned by writs issued by the Chancellor, and all the acts passed are enrolled and kept in Chancery. But these matters and the learning respecting them, are not here intended to be treated of, but only such parts of his 3*] common-law jurisdiction as have *been made the subject of consideration in the Court of Chancery. These consist, principally of three kinds :

1. *The Nomination, &c of Officers of the Court ;*

Such as the *Masters in Chancery*(b), and *Cursitors*, who are nominated, admitted, and sworn by the Chancellor(c). Another part of the Chancellor's common-law authority is in respect of,

*4] *2. *Proceedings in the Petty-Bag Office.*

In this Court the Chancellor has jurisdiction, to hold a plea of *scire facias* to repeal the King's *letters patent*(d) ; and on petitions of right, *monstrans de droit*(e), traverses of office, *scire facias* upon recognizances,(f) executions upon statutes, &c.

In *Scotland*, too, at a very early period, the Chancellor of that country seems to have exercised a right of presentation somewhat similar to the Chancellor of England ; for in the year 1309, *William de Bevercotes*, the Scottish Chancellor, presented a petition to the King in Parliament, praying that he might have the gift of *all* the King's churches, as the former Chancellors used to have ; and this prayer was granted, as to those benefices which did not exceed ten pounds per annum. Ryley's *Placita*, 613, 14, &c. Chalmer's *Caledonia*, Vol. I. p. 623.

(b) The antiquity of the Masters in Chancery appears in the preamble of an Act passed in the 13 Charles 2, for increasing the fees of Masters in Chancery. It is a private act, and not printed in the usual editions of the Statutes. The original act at the Parliament Office has been consulted. (Nu. 16.) This preamble runs thus: "Whereas the office of the master of the Chancery in ordinary is of very ancient institution, and of necessary use, and continual attendance for the despatch of the business depending in that court ; it appearing by ancient records that the constitution of that court was long before the conquest, much of the duty, pains, and attendance whereof lieth on the said masters. And for that it conduceth much to the due

administration of justice, that those who exercise places of trust should have competent and certain rewards suitable to their pains and labour, whereby they may in due manner support the quality of their places, and that it is but fitting and necessary for the subject to allow a moderate payment where they receive a proportionable advantage (a fee of lower pence in times of that antiquity being as much in value as two shillings now) by reason whereof in process of time, and the improved rate of all necessaries, the present recompense of those ancient offices is no way competent and proportionable to their pains and attendance, which are likewise very much increased, without any increase hitherto of what was so anciently allowed as aforesaid." &c.

(c) Vid. *Judicial Authority*, &c. p. 60.

(d) 4 Inst. 79. As to proceedings on a *scire facias*, and a judgment for cancelling letters patent, see Prince's 8 Co. 1, &c.

(e) See the form of a judgment upon a *monstrans de droit*, 8 Co. 404.

(f) Recognizances entered into, in pursuance of an order of the court of Chancery will not be allowed to be sued upon, otherwise than by a *scire facias* in Chancery. *Grant v. Stone*, 1 Vern. 213. And see *Latch*. 3. 1 Eq. Cas. Abr. 128. *Cro. Car.* 113.

which being registered in this court, the process issued out of the same, and was returnable there, and entered in the office, called the *Petty-Bag* (g). All personal actions by or against any officer or minister of the court, in respect of his service or attendance, may be brought in this court (h).

When, however, the parties proceed to issue, the Chancellor cannot try it, as he may do a *demurrer* (i), but must deliver the record into the King's Bench, where judgment is given: and no judgment can be given by the Chancellor unless in Term; and where it was given out of Term it was ordered to be drawn up the next Term (k).

After a verdict in the King's Bench, in an action commenced in the *Petty-Bag*, if the defendant has not been charged in execution within two Terms, he *must, it seems, apply to the [*5 Court of King's Bench to discharge him; a judge of the King's Bench made an order for that purpose, and the Chancellor, to remove any difficulty, made an order to the same effect (l).

An application for a new trial must be made to the Court of King's Bench, and not to the *Lord Chancellor* (m).

When a writ of *scire facias* is issued out of the *Petty-Bag* to repeal a charter, upon issue being joined, the record is transmitted into the Crown Office of the King's Bench, and the cause is tried at the bar of that Court (n).

The jurisdiction of the Chancellor in this Court being so very limited, is the reason, probably, that it is seldom resorted to, and that so little is to be found in the books respecting it. It has been said to be nearly obsolete (o).

A very important part of the Chancellor's common-law authority respects,

3. The ordering of Writs to be made out by the Cursitors.

All original writs are awarded out of the Chancery by the Chancellor; and his power, in this respect, is defined by the common law; and if he exceeds his authority, or does not pursue it in such order as the law has appointed, the party, by exception, may abate such writ (p). The work entitled *Register Brevium* *contains the particulars of all the writs, nearly two [*6 hundred in number, issuable by the Chancellor; and it has been most ably commented upon by *Fitzherbert* in his *Natura Brevium*, which book, together with the notes upon it by Sir *Matthew Hale*, have nearly exhausted the subject.

(g) 4 Inst. 80.

(h) 2 Bac. Abr. 138.

(i) Ibid. Upon motion the court will order a demurrer in the *Petty-Bag* to be set down for argument. [King v. Knox, Coop. 28.]

(k) Ambl. 296.

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(l) Fraser v. Lloyd Coop. 187.

(m) Ex parte Barker, 1 Cox 418.

(n) As was the case in Regina v. Ballivos, &c. de Bewdley, 1 P. Wms. 207.

(o) 1 Wooddes. Lect. 125.

(p) Plowd. Rep. 74.

So little is to be found in the Chancery Reports respecting the exercise of the Chancellor's common law authority, that scarcely any thing remains to be added on this head, except some few detached remarks.

I. The writ *de ventre inspiciendo* is obtainable of common right, on petition (*d*) ; it is to be found in the *Register*, though not in *Fitzherbert's Natura Brevium*, and is issued for the security of the next heir, (i. e. *verus hæres*, not *hæres apparens*) (*e*), or *10] in *behalf of a tenant in tail (*f*), or *hæres factus* (*g*), as a devisee in fee, in tail, or for life (*h*), to guard them against supposititious births. In the *Civil Law* there was a similar writ (*i*) ; and it was introduced in the English Law previous to the reign of Edward I. (*k*).

The general effect of the cases is, that the Court has considered this as a writ for the furtherance of justice, and that it ought to issue whenever the justice of the case requires it (*l*).

The writ, it appears, has been issued in cases of *personal estate* (*m*) ; but such an application of it has been considered as a stretch of power (*n*).

If the widow marry again, yet still the writ may issue ; but instead of being placed in the custody of the sheriff, she is permitted to remain with her husband, on his entering into a recognizance that she should not remove from his house, and that some of the women returned by the sheriff should see her every day, and three or more be present at her delivery (*o*).

The first writ issued on these occasions is to see whether the widow be with child, and *quando paritura* ; and if the jury (which is composed of men and women, though the *search* is made by the latter) (*p*) find her with child, then she is (in strictness) re- *11] moved *by a second writ issuing out of the Common Pleas, (where the first is returnable,) to a castle (so are the old authorities,) where the sheriff is to keep her safely (*q*) ; but it has been held that there is no occasion to execute the writ in that strict manner, provided people of skill have, from time to time, free access to the widow, and might be present at the birth (*r*).

II. A *supplicavit* (*s*) has often been granted by the Court, upon articles filed on oath (an affirmation will not do) (*t*), of assault and battery, and that the party goes in fear of her life (*u*).

(*d*) *Ex parte Bellat*, 1 Cox, 299.

(*e*) See 6 Ves. 260, and *Allan v. Allan*, 15 Ves. 136.

(*f*) *Ex parte Aiscough*, a P. Wms. 592 S. C. Mos. 391.

(*g*) See *ex parte Wallop*, 2 Dick. 707.

(*h*) See the cases mentioned by Mr. Cox in note (1) to *Aiscough's case* ; and see *ex parte Bellat*, 1 Cox, 297.

(*i*) *Halifax's Anal. of civil law*, p. 14.

(*k*) *Hargr. jurisc. Exerc.* 1 vol. 413.

(*l*) *Ex parte Wallop*, 4 Bro. C. C. 98.

(*m*) See case cited in Mos. p. 391.

(*n*) Co. Lit. 8 b. n. 3.

(*o*) Cro. Jac. 685.

(*p*) Bract. 69. Brit. 165 b. Flet. lib. 1. c. Reg. Br. Orig. 227 a.

(*q*) Cro. Jac. 685, 6.

(*r*) See *ex parte Aiscough*, 2 P. Wms. 594. S. C. Mos. 391.

(*s*) As to this writ, see F. N. B. 183.

(*t*) *Ex parte Grumleton*, 2 Atk. 70.

(*u*) *Dobbyn's case*, 3 Ves. and Bea.

182.

In some cases the writ has been refused, and the party grieved directed to apply to the justices of the peace (x). In a very early case (in 1631) where exceptions were taken to the articles as being too general, and production of a certificate of good behaviour, the Court referred it to two justices of the peace to examine the truth of the articles and certificate, and that the question of the *supplicavit* should be stayed in the mean time (y). To ground the Writ, the articles should not be in general forms, as "*fearing*," "*being threatened*," &c.; but some fact must be shown on which the fear is grounded (z). The Court, it seems, uses a discretion on the subject (a); but in general, the Court of Chancery and also the King's Bench, in case of *articles [*12 of the peace, at the end of a year, if nothing new happens, discharge a party committed for want of finding sureties (b). Sometimes the security is lessened (c), and the master is directed not to be strict as to the abilities of the sureties (d); but the Court will not discharge a *supplicavit* on an affidavit denying the facts, for it will not try them on affidavit; but where combination or contrivance appear, the *supplicavit* will be discharged (e).

III. With respect to the *Writ of Certiorari* (f), it has been holden, that where a *replevin* is in a court of record it may be removed by a *certiorari*, issuing either out of the Court of King's Bench, or the Court of Chancery (g). Where a *certiorari*, issues with a view to use the record as evidence, the tenor, if returned, is sufficient, and countervails the plea of *nul tiel record*; but when the record is to be proceeded upon, the record itself must be returned (h): and there is no difference when the proceeding upon the record is to be removed, whether it be before judgment, or after, for in both cases the record itself must be removed (i).

IV. As to *Writs of Prohibition* (k), it has been determined, that if one be sued in an inferior court, for a matter out of its jurisdiction, the defendant may either have a *prohibition* from one of the common-law *courts of Westminster-hall, or, as [*13 this may happen in a vacation when only the Chancery is open, that Court may be moved for a prohibition (l), upon a petition (m), and affidavit (n), that the fact arose out of the jurisdiction,

(x) Clavering's case, 2 P. Wms. 202. As to the authority of justices of the peace in these cases, see F. N. B. 187.

(y) Smelley v. Flatman, 1 Dick. 6.

(z) King v. Brinlow, Mich. 7 Geo. 2. 1733. MS.

(a) Ex parte King, Ambl. 334. See the order in this case from Register Book, Heyn's case, 2 Ves. and Bea. 182, n. b.

(b) Baynum v. Baynum, Ambl. 64.

(c) Id. ibid.

(d) Ex parte Sir R. Grosvenor, 3 P. Wms. 113.

(e) Ex parte King, Ambl. 240.

(f) For the general doctrine as to a writ of *certiorari*, see F. N. B. 548.

(g) F. N. B. 544. Woodcraft v. Kinaston, 2 Atk. 317. S. C. 1 Dick. 233.

(h) F. N. B. 548, n. a. 2 Atk. 318.

(i) Woodcraft v. Kinaston, 2 Atk. 318.

(k) The doctrine as to writs of *prohibition* is set forth at large in F. N. B. 93, &c.

(l) Iveson v. Harris, 7 Ves. 257.

(m) See Hill v. Turner, 1 Atk. 516. Newhouse v. Milbank, 1 Vern. 276.

(n) Walker v. Fanderheide, 1 Dick. 336.

and that the defendant tendered a foreign plea, which was refused (*o*). But if it appears on the face of the declaration, that the matter is out of the jurisdiction of the Court, then a prohibition will be granted without an oath of having tendered the foreign plea (*p*).

The Court of Chancery, according to some cases, will not entertain a motion for a prohibition in *Term-time*,* when the other Courts are open. *Lord Thurlow* refused to do so, on the ground of the public inconvenience, produced by interrupting the proper business of the Court when recourse might be had to other courts. *Lord Redesdale*, in a case very strongly calling for the interposition of the Court, as it was too late to apply elsewhere, adopted this resolution, observing that, "the habits of this Court were not adapted to this sort of business" (*q*). But in a more recent case, the objection that there had been time to apply to a court of law was considered as untenable; and it was said that, "in applications of this nature the Court has no discretion whether or not it will hear the party; it is bound to grant the writ *14] on a *proper case being made; it has even in *Term-time* a concurrent jurisdiction with a court of law" (*r*).

A *prohibition* does not lie to an inferior court after the defendant has imparled generally (*s*), or pleaded there; for by so doing the defendant admits the jurisdiction. But at the instance of the King, a prohibition lies, though the defendant has pleaded. If a prohibition has been granted, the Court will issue a *supersedeas*, if there is an affidavit that the cause arose within the jurisdiction (*t*).

If a *prohibition* has been improperly granted, the Court will grant a *supersedeas* (*u*); but the inferior court must obey the writ, whether improperly issued or not; it has no discretion; to disobey it would be a contempt (*x*).

The Spiritual Court has jurisdiction over Grammar Schools; but in a case where the libel was for teaching schools generally, without saying what school, the Chancellor granted a *prohibition* (*y*).

So, if the Spiritual Court has granted administration to a wrong person, resort may be had in vacation to the Chancellor, for a prohibition, returnable into the King's Bench or Common Pleas (*z*).

When a churchwarden had passed his accounts before the parson and a majority of the parishioners, and was afterwards cited

(*o*) *Ib.* and *Anon.* 1 P. Wms. 476, 7.; but see, on this subject, *Iveson v. Harris*. 7 Ves. 251.

(*p*) *Anon.* 1 P. Wms. 476. and see *Salk.* 549.

(*q*) See *Blackborough v. Davis*, 1 P. Wms. 43, and *Anon.* *ib.* 475. *Montgomery v. Blair*, 2 Sch. & Lest. 136.

(*r*) *Ex parte Lynch*, 1 Madd. Rep. 24.

(*s*) *Anon.* 1 P. Wms. 477.

(*t*) *Anon.* 1 Vern. 301.

(*u*) 1 P. Wms. 476.

(*x*) *Iveson v. Harris*, 7 Ves. 254, 5.

(*y*) *Cox's case*, 1 P. Wms. 29.

(*z*) *Blackborough v. Davis*, 1 P. Wms. 43.

in the Ecclesiastical Court, and pleaded the before-mentioned facts, and the plea was refused, a prohibition was allowed; the plea being considered as proper (a).

*A prohibition has been refused to the Judge of the Prize [*15 Court, to enjoin him from proceeding in a cause involving a question of prize (b); but if a Court of Prize or other inferior court, misconstrue their jurisdiction, it is, it seems, a ground of prohibition (c). Where a question is incidental to a question of Prize, such Court has jurisdiction, and a prohibition will not be granted (d).

V. The *teste* of original writs against hundreds, corporations, heirs, and in several other cases, is, by the practice of the cursitors, the same day the writs are bespoke (e). But it is not so with all writs; and where a *capias* was taken out on the 31st of January, and the original on which it was founded made out on the same day, but *tested* on the preceding 16th of October, the common *teste*-day before Michaelmas Term, and the defendant pleaded *non assumpsit*, and *non assumpsit infra sex annos*, and then moved that the *teste* of the writ might be altered and made the 31st of January, the motion was refused (f).

VI. *Writs of error* are due of right in all cases except *treason* and *felony* (g); and *writs of error* in criminal cases will be ordered to be sealed, provided they are first signed and allowed by the *Attorney General* (h).

VII. The Chancellor will not order a *mandatory writ* to [*16 the Chief Justice of the King's Bench to sign a *bill of exceptions*, though such a writ has issued to a judge of an inferior court, the judge of the Sheriff's Court in London (i), for instance.

This writ, which has rarely been used, is grounded on the Stat. *Westmin. 2d.* commanding judges to seal a bill of exceptions; but it has been held not to lie where the exception taken is to an order of a court of law to amend its own records, nor, as it seems, to any order made upon motion. And in cases where the writ does lie, it ought to be made out by the *clerk of the Crown*, and not by the *cursitor*; nor ought it to be issued without a special order from the person holding the Great Seal (k).

VIII. An *original*, will on petition be allowed to be filed after a writ of error brought to reverse a judgment, where the omission proceeds from the mistake or nesciance of the clerk, but

(a) *Wainwright v. Bagehaw*, East, 7 Geo. 2d. 1733, M. S. &c. 1 P. Wms. 437.

(b) *Ex parte Lynch*, 1 Madd. Rep. 15.

(c) Arg. in the case of the Danish Ship *Noysonhed*, 7 Ves. 595. and see 1 Hen. Bla. 164.

(d) Case of the Danish ship *Noysonhed*, 7 Ves. 593.

(e) *Price v. Hundreds of Chewton*,

(f) *Robinson v. Stevenson*, Ambl. 375.

(g) 2 Salk. 504.

(h) *Crawle v. Crawle*, 1 Vern. 170; and see what is said in the *Rioters case*, 1 Vern. 175.

(i) The *Rioters case*, 1 Vern. 175.

(k) *Lessee of Lawlor v. Murray*, 1 Sch. & Lefr. 75, and see 1 Vern. p. 175. See on this subject 2 Inst. 427.

not where it arises from mistake or misprision (*l*). Slender excuses have been admitted (*m*). Such permission also has been given in cases of *quare impedit*, and in actions against the hundred for a robbery, where the suit must be commenced within a limited time ; and where the time had been so far elapsed as that the statute of limitations had been a bar, if the judgment should be reversed (*n*.)

IX. It has been said that after a writ has once issued, it is *de* *17] *officio*, and the Chancellor has nothing *further to do in it (*o*) ; and this is true, unless there be an informality in the writ. It seems to be admitted, that the Chancellor may *quash* a writ *before* it is *returned* (*p*), but not *after* (*q*) ; nor before it is returned, unless error appears on the face of it (*r*) ; and even then (except the party be in custody,) the best course is by plea in the court where it was returnable (*s*). But a writ though returned may on application be *superseded* by the Chancellor (*t*).

An *executrix*, in custody under a *Writ de excommunicato capiendo* (*u*) for not appearing to a citation by a creditor to exhibit an inventory, moved for a *supersedeas*, disputing the debt upon equitable grounds ; but the Court refused to supersede the writ, and said, it followed of course upon the *significavit* (*x*).

A *supersedeas* to a writ *de excommunicato capiendo* has been denied, though the *significavit* was general and uncertain ; the method to proceed being by *habeas corpus* ; but where an appeal was brought, a *sepersedeas* has been granted (*y*).

If a *curator* alters the return of an original, the writ will be *superseded* (*z*). unless it is only altered as to mistakes merely literal, and re-sealed (*a*).

*18] *A writ of error may be superseded by the Chancellor *quia improvide emanavit* (*b*).

A writ of *ad quod damnum* has been quashed for insufficiency in the equivalent required (*c*), and has been set aside for surprise in the execution of it (*d*).

X. According to Sir Edward Coke (*e*), in all those cases where a man is excommunicated by the Bishop against law, he shall have a writ out of Chancery directed to the Bishop, commanding him to *assoil* him (*f*).

(*l*) Anonymous, 1 P. Wms. 411.

(*m*) Anonymous, 3 P. Wms. 314.

(*n*) 1 P. Wms. 412, and see 3 Lev. 347.

(*o*) Anonymous, 2 Atk. 237.

(*p*) Rex v. Burrard, 1 P. Wms. 435.

(*q*) Ex parte Little, 3 Atk. 479 : and see King v. Fowler, Salk. 293, and Trebec v. K. 2 Atk. 498.

(*r*) Ogyer v. Haywood, Ambl. 59.

(*s*) Weavers Company v. Hayward, 3 Atk. 363.

(*t*) Lessee of Lawlor v. Murray, 1 Sch. & Lefr. 76.

(*u*) See as to this writ, F. N. B. 144.

(*x*) The King v. Blach, 5 Ves. 113.

(*y*) Rex v. Sneller, 1 Vern. 24.

(*z*) Weavers Company v. Hayward, 3 Atk. 362, and see *ibid.* p. 600.

(*a*) Smith v. Wilmer, 3 Atk. 595.

(*b*) Dean of Dublin, &c. v. Dowgate, 1 P. W. 351.

(*c*) Ex parte Armitage, Ambl. 294.

(*d*) Ex parte Venner, 3 Atk. 766.

(*e*) 12 Co. 67, title "Prohibition;" and see 2 Inst. 623.

(*f*) 7 Ed. 4. 14. Borame's case, 16 Ves. 346.

XI. With respect to *patents*, it has been holden, that on an application to the Lord Chancellor to withhold the Great Seal from a patent, he will only consider whether it is legal or not, and not whether the Crown ought or ought not to grant it (g); but there are three stages in which it may be opposed: 1st, While it is under the consideration of his *Majesty*; 2d, When it comes to the *Privy Seal*; and 3d, When it comes to the *Great Seal* (h).

Since the union of Great Britain and Ireland the Great Seals are kept distinct for patents (i).

The Chancellor will not sign a patent for a *theatre* which does not put the parties under some control, even though there should be no *caveat* against it (k). Colley Cibber, writing in regard to some theatrical disputes, in King William's time, says, "The *learned of the law were advised with, and they gave their [*19 opinion, that no patent for acting plays, &c. could tie up the hands of a succeeding prince from granting the like authority when it might be thought proper to grant it (l)." In the late applications for a patent for a third winter theatre, this doctrine seems to have been admitted.

The Court has expressed itself as cautious how it affixes the Great Seal to a patent for a grant of *Warden of the Fleet*, as it might occasion a general escape of the prisoners (m).

It has been holden, that after a *patent* has passed the Great Seal, the time for enrolment cannot be enlarged without an act of parliament (n): if, however, the enrolment was delayed by mistake, a new patent might be obtained, and the officers, probably, induced to remit their fees (o).

It is established, that a patent may be obtained for an *Improvement*. If a person obtains a patent, he may afterwards, on the expiration of that patent, obtain another patent for an improvement on the first patent; but the second patent does not exclude the public from the use of the object of the first patent (p).

In a *scire facias* to repeal a patent, the *venue* cannot be changed from *Middlesex* to any other county (q).

XII. *Coroners* may be removed by the Chancellor, where they misbehave or live out of the county; but *as theirs [*20 is an office of freehold, the Court will not, when the Coroner goes out of the way, order a writ to issue *de coronatore exonerando*, until there is an affidavit of service at the last place of his abode; nor does the authority of the court extend so far as to appoint another coroner; but the choice of the new one must be by a majority of freeholders (r).

(g) *Ex parte Daly*, Vern. & Scriv. 199.

(h) *Ib.*

(i) *Oxford and Cambridge Universities v. Richardson*, 6 Ves. 708.

(k) *Ex parte O'Reilly*, 1 Ves. jun. 113.

(l) *Life of Cibber*, p. 157.

(m) *Col. Leighton's case*, 2 Vern. 174.

(n) *Ex parte Koope*, 6 Ves. 99.

(o) *Ex parte Beck*, 1 Bro. C. C. 578.

(p) *Anon.* 30 June, 1807. MS.

(q) *The King v. Haine*, 2 Cox, 235.

(r) 3 Atk. 184.

XIII. A writ of *Replevin* (s) may be obtained, not merely where there has been a *distress*, as is generally imagined, but in all cases where a person takes goods out of the possession of the person who applies for the writ, upon his giving security, until it shall appear whether the goods are rightfully taken; but if *A.* be in possession of goods in which *B.* claims a property, *Replevin* is not the proper writ to try that right (t).

The Court will not, on motion, supersede a writ of *Replevin*, unless a fraudulent use is made of it (u).

XIV. A writ *de cautione admittenda* (x), will not be allowed to issue, unless it appears upon affidavit that the Bishop had refused to admit of caution (y).

XV. The writ *de homine replegiando* is an original, suable of right, on petition or motion, and returnable in a court of law (z). Two persons may join in suing out this writ (a). It is not su-*21] persedeable in Chancery; but the party must plead to it in the court where it is returnable (b). A wife, it has been determined, cannot obtain this writ against her husband (c).

XVI. The writ of *melius inquirendo* is another of the common-law writs issued by the Chancellor, and noticed in *Fitzherbert's Natura Brevium* (d).

In regard to this writ, it has been holden, that if a person is found by office not to be an alien, this is not conclusive on the Crown, but *amelius inquirendum* may issue; upon which, if the party is again found not to be an alien, the Crown is bound (e).

XVII. Writs of *Ne exeat regno*, writs of *Injunction* (f), writs of *Certiorari*, and by way of process, or for the enforcement of process, will be elsewhere considered.

XVIII. The Lord Chancellor has by the common law, jurisdiction to grant an *habeas corpus*, even in vacation; and *Jenk's* case, in which *Lord Nottingham* was of a contrary opinion, has been overruled (g).

XIX. It has been observed in an able controversial work (h), said to be composed by *Mr. Yorke*, (afterwards *Earl of Hardwicke*) (i), that there is no one species of all the judicial acts

(s) For the doctrine as to a writ of *Replevin*, see F. N. B. 155.

(t) in re. *Wilson, Schoales & Lefr.* 321, n. *Ex parte Chamberlaine*, 1 Sch. & Lefr. 320. *Shannon v. Shannon*, ib. 327.

(u) *Anon.* 2 Atk. 237; and see *Farrell v. Beresford*, 1 Ball & Beatty, 328.

(x) See as to this writ, F. N. B. 145.

(y) *Archbishop of York v. ———* 1 Vern. 119.

(z) *Treblecock's case*, 1 Atk. 633.

(a) F. N. B. 152. F.

(b) 1 Atk. 683.

(c) *Atwood v. Atwood*, Prec. Ch. 492. Gilh. 149.

(d) P. 572; and see 36 Edw. 3. c. 13. 2 & 3 Edw. 6. c. 8.

(e) *Ex parte Duplessis*, 2 Ves. Sen. 538, &c. and p. 555.

(f) See post.

(g) See the elaborate judgment of Lord Chancellor Eldon in *Ex parte Crowley*, 1st Swanst. *Jenk's* case is not in print; but it is to be found in the MS. reports of Lord Nottingham, a copy of which is in the possession of Lord Eldon.

(h) Judicial authority of the Master of the Rolls, p. 83.

(i) See Bishop Hurd's *Life of Warburton*.

performed on the common-law side of the Court of Chancery, of which there are not instances of their being also performed *by the Master of the Rolls ; but this has been a matter of [*22 much controversy ; and it has been as positively said, and it seems to be the better opinion, that the Master of the Rolls has no original jurisdiction respecting matters arising on the common-law side of the Court of Chancery (*k*).

The view thus taken of the Chancellor's common-law jurisdiction is necessarily very limited ; being, as before observed, confined to such parts of it as have come into discussion in the Court of Chancery. It would require a volume to particularize and describe it in its full extent.

*BOOK II.

[*23

EQUITY JURISDICTION OF THE CHANCELLOR.

BY the generality of the older writers, the Equity Jurisdiction of the Chancellor is described under three heads—*Fraud*, *Trust*, and *Accident* ; but by the word *Accident*, they usually mean when a case is distinguished from others of the like nature by *unusual circumstances* (*a*).

It will, however, be more convenient to consider the *Equity Jurisdiction* of the Chancellor (except what relates to the *Practice*, which will be treated of hereafter) under the following heads :

- I. ACCIDENT AND MISTAKE.
- II. ACCOUNT.
- III. FRAUD.
- IV. INFANTS.
- V. SPECIFIC PERFORMANCE OF AGREEMENTS.
- VI. TRUSTS.

According, even to this enlarged classification of the subject, it may not be very obvious how the great multiplicity of doctrines arising out of the Equity Jurisdiction can be included ; but on consulting the divisions and subdivisions of each head, it will be found, that without any very arbitrary arrangement, they include every branch of Equity.

(*k*) *Lloyd v. Scott*, 2 Dick. 576. See also, *History of the Chancery*, and Le-

gal Judicature, &c.

(*a*) See *Lucas*, 1. 3. *Proc. Ch.* 231.

*CHAP. I.

ACCIDENT AND MISTAKE.

Accident.

It is not under the very extended signification of the term *Accident*, before alluded to, that the subject is now intended to be treated of, but only according to its ordinary and more restrained sense.

The Jurisdiction of the Chancellor in cases of *Accidents* has been long established (*b*): they appear to have been relieved against in the reign of Henry VII. (*c*); and from *St. Germain's Book, Doctor and Student*, as well as from Sir *George Cary's Reports* (*d*), it appears, they continued to be relieved in the succeeding reign, and now, certainly, they form an acknowledged branch of Equity Relief.

Where an instrument on which a title is founded, is lost, a Court of Equity will interfere to supply the defect occasioned by such accident. As where a Mortgagee had the Mortgage Deeds stolen from him, on a bill to *foreclose*, an account was directed and an inquiry, what was become of the Title Deeds (*e*); and on a bill to *redeem* under the same circumstances, a similar inquiry was directed; and the *Master* having by his report stated the loss of part of the Title Deeds, a decree was made *25] that the defendants, on *payment to them of what was due on the Mortgage, should re-convey and deliver up the remaining Title Deeds, &c. in their custody (*f*).

So also, where a *Bond* is lost, (except, perhaps, a voluntary Bond) (*g*), relief will be given in equity (*h*); but no relief is given there upon a lost note (*i*): and the reason is, that at law the party could not recover without a *profert*, and giving *oyer* of the bond (*k*); but *profert* and *oyer* was not necessary to recover at law upon a lost note (*l*); proving of the contents being sufficient, and nothing standing in the plaintiff's way. And

(*b*) *East India Company v. Boddam*, 9 Ves. 466.

(*c*) Pasch. 7. Hen. VII. 12.

(*d*) P. 2.

(*e*) *Stokoe v. Robson*, 3 Ves. & Bea. 54.

(*f*) *Smith v. Bicknell*, mentioned in note to the last-cited case.

(*g*) *Underwood v. Slaney*, 1 Ch. Cas. 77.

(*h*) Lat. 24. *Toulmin v. Price*, 5 Ves. 235.

(*i*) *Mossop v. Eadon*, 16 Ves. 430; and see *Glynn v. Bank of England*, 2 Ves. 41.; but see what is said in *Toul-*

min v. Price, 5 Ves. 240, and *Walmesley and Child*, 1 Ves. 341. By 9 and 10 Wm. 3. c. 17. s. 3, relief is given at law in the case of a lost Bill of Exchange; and that seems the only course to be taken in such case. See *Divis v. Dodd*, 4 Taunt, 603. An express promise to pay the contents of a lost Bill of Exchange, if made without some new consideration, is, it seems, void. *Ib.*

(*k*) See 1 Ves. 393, and 2 Ves. 41.

(*l*) *Walmesley v. Child*, 1 Ves. 245, and see *Glynn v. Bank of England*, 2 Ves. 41, and *Snellgrove v. Bailey*, 3 Atk. 214.

though Courts of Law; in case of a *lost Bond* have dispensed with a *profert and oyer* (m), a doctrine, which when first broached seems to have startled Lord Hardwicke (n), and has excited much surprise in subsequent Judges (o); yet Courts of Equity having once had jurisdiction, *they still insist on retaining [*26 it, though the original ground of the Jurisdiction, the inability to recover at Law, no longer exists (p).

A Court of Equity will not only give relief against the Principal, where a bond is lost (q), burnt, or cancelled, by accident or mistake, but will also set it up against a *surety* in such Bond (r); and this, though the Principal be out of the Jurisdiction of the Court (s). So where a *Rent-charge* is granted by deed, and the deed happens to be lost, a copy cannot be read in evidence at law; because the party must declare with a *profert*, as the defendant is entitled to *oyer* of the original; so that the plaintiff must either set up a prescriptive title to the Rent, from a constant and uninterrupted payment, or he must bring a bill to be relieved against the accident of the original's being lost (t).

The Court, however, to prevent fraud, has in cases of lost securities, prescribed conditions on which they administer relief.

If a Deed or Instrument, upon which the demand arises, is lost, and only a *discovery* is sought, an affidavit of the loss is unnecessary (u); for it cannot *be supposed a man would bring [*27 a Bill only for the recovery of a deed he was possessed of (x), and the expense of which discovery he must pay (y); but if relief is prayed beyond the discovery, e. g. to have payment of the debt (z), or the profits of land under the deed (a), an affidavit of the loss must be annexed; and the want of it would be a ground

(m) See *Read v. Brookman*, 3 T. R. 151. *Hender v. Stephenson*, 10. East 55. See also, as to a burnt bond, *Routledge v. Burrell*, 1 H. Black. 254. *Totty v. Nesbit*, 3 T. R. 153. In *Hendy v. Stephenson*, 10 East 60, the case of *Read v. Brookman* seems rather shaken.

(n) See *Whitfield v. Faussett*, 1 Ves. 389, &c and what he had previously said in 2 Atk. 61.

(o) See what is said ex parte Greenway, 6 Ves. 812, 813 and in *East India Company v. Boddam*, 9 Ves. 464.

(p) See what Lord Thurlow says in *Atkinson and Leonard*, 3 Bro. 224; and see *East India Company v. Boddam*, 9 Ves. 464, &c *Bromley v. Holland*, 7 Ves. 19. *Toulmin v. Price*, 5 Ves. 239.

(q) *East India Company v. Boddam*, 9 Ves. 464, the case of a lost bond; see *Pickering v. Keeling*, 1 Ch. Rep. 78. *Bonman v. Newcombe*, 2 Ventr. 365.

Lee v. Sir Robert Henley, 1 Vern. 37.

(r) *Skip v. Huey*, 3 Atk. 93, the case of a burnt bond; and see 1 Cha. Cas. 77.

(s) *East India Co. v. Boddam*, 9 Ves. 464. This and the preceding case answer the query put in 1 Fonbl. Eq. 41 n. w.

(t) 2 Atk. 61.

(u) *Whitworth and Golding*, 1 Eq. Abr. 14. S. C. 2. P. Wms. p. 541. *Godfrey v. Turner*, 1 Vern. 247. 1 Ch. Cas. 11. Anon. 1 Vern. 180. Prec. Ch. 536; the case contra. 1 Vern. 59, seems a mistake.

(x) Anon. 1 Chan. Cas. 11.

(y) See post, p.

(z) 1 Vern. 247. 1 Cha. Cas. 231. *Whitchurch v. Golding*, 2 P. Wms. 541.

(a) *Ib.* and see also on this subject *Redeod. Tr. Pl.* p. 100, 3d Edit. and *Moseley*, 192, there cited.

of demurrer (b); for a bare suggestion in a Bill is not sufficient to support the Jurisdiction, the Court requiring a degree of proof of the circumstance on which it is sought to transfer the Jurisdiction from the Court of Common Law to a Court of Equity (c). If the deed lost concerns the title of lands, and possession is prayed to be established, such affidavit must be annexed. So, on the loss of a Bond, and a Bill filed, in consequence, to be paid the amount, a Bill of Discovery is not sufficient; the Bill should be also for relief—to be paid the money thereon; and an affidavit must be annexed (d). In cases, however, of this description, a Trial at Law will be directed if the Defendant insists upon it (e).

By the 14 George II. c. 20, s. 5, a Recovery will after twenty years be effectual, though the Deed or Deeds for making the Tenant to the Præcipe should be lost, or not appear; if it appears there was a Tenant to the Writ, and that the persons joining in the Recovery had a sufficient estate and power to suffer the Recovery; and where a Lease and Release were made to create a Tenant to the præcipe in a recovery, and the Lease was lost, it was held to be a case within the relief given by the Act (f).

It appears to be upon the principle of relieving against accidents by loss of deeds, that grants are, in many cases, presumed or supplied. Where, therefore, a person has been in possession for a great length of time without interruption, Equity will supply all those circumstances or formal ceremonies, which the Law deems necessary to the operation of the original conveyance; as Livery, a Surrender (g). &c. and will not allow such possession to be disturbed (h). Where rent has been paid twenty years Equity will presume a grant (i). And where a Common has been inclosed for thirty years, Equity will presume the Inclosure to have been with the consent of all persons interested, and will not allow it to be thrown open (k).

And where a man is entitled to a rent out of lands, as *Chief Rents* (l), or *Quit Rents* (m), and from length of time the remedy at law is lost, or become very difficult, the Court of Chancery has interfered and given relief, upon the foundation

(b) *Nicholson v. Pattison*, 1 Vern. 310. 1 Ves. 346, and see *Redesd. Tr.* Pl. 3d Edit.

(c) *Whitworth v. Golding*, 2 P. Wms. 541.

(d) *Walmesley v. Child*, 1 Ves. 344, 5. *Teressey v. Gory*, Finch 301. Anon. 2. Freem. 71.

(e) *Clavering v. Clavering*, 2 Ves. 233.

(f) *Holmes v. Ailsbie*, 1 Madd. Rep. 351.

(g) *Lyford v. Coward*, 1 Vern. 195.

(h) *Ibid.*

(i) *Steward v. Bridger*, 2 Vern. 516.

(k) *Sitway v. Compton*, 1 Vern. 32.

(l) *Duke of Bridgewater v. Sir Francis Edwards*, 6 Bro. P. C. 368. Tomline's Ed. and see *Eton College v. Beauchamp*, 1 Ch. Cas. 121. 1 Eq. Abr. 32 (B) and 364.

(m) *Holder v. Chambergh*, 3 P. Wms. 257; but see *North v. Earl of Stafford*, 3 P. Wms. 148. *Duke of Leeds against Lord Radnor*, 2 Bro. C. C. 340. and 518

only of payment of the rent for a long time, which bills are called Bills founded upon the *sole*. The Court has even gone so far as to give relief where the nature of the rent (as there are many kinds at Law,) has not been known, so as to be set forth (n): but then all the terre-tenants of the lands out of which the rent issues must be brought before the Court, the better to enable it to make a complete decree (o).

So, where there is a clear right to rent, but no remedy at Law, as no demesne Lands on which to distrain, Equity will give relief (p); as it will also, where, from a confusion of Boundaries, no Land can be found for a distress (q).

It has long been settled, that a tenant contracts, among other obligations resulting from that relation, to keep distinct from his own property during the tenancy, and to leave clearly distinct at the end of it, his landlord's property, not in any way confounded with his own. It is therefore a common Equity that a tenant having put his landlord's property and his own together for his own convenience, in order to make the most of it during his tenancy, is bound at the end of the term to render up specifically the landlord's land; and if he cannot, that a commission shall issue from a Court of Equity to inquire what were the Lands of the Landlord; the Court taking care, to the intent that the Tenant may discharge his obligation *to do what [*30 is right, as to the possession in the mean time; and if the Tenant has so confounded the Boundaries, subdividing the Land by hedges and stones, and destroying the metes and bounds, so that the Landlord's Land cannot be ascertained, the Court will inquire what was the value of the Landlord's Estate, valued fairly, but to the utmost, as against that Tenant, who has himself destroyed the possibility of the Landlord's having his own (r). The granting of Commissions to ascertain Boundaries is a very ancient branch of Equitable Jurisdiction (s). The two Writs in the Register, *de rationabilibus divisis* (t), and *de perambulatione facienda* (u), are supposed to have led to the Jurisdiction in cases of controverted boundaries (x). In *Wake v. Comers* (y) Lord Northington was of opinion, that the Court has simply no Jurisdiction to settle the Boundaries of Land, unless some Equity was superinduced by act of the parties; and in that case a bill to ascertain the Boundaries of two Manors was dismissed, there being no dispute as to the soil; and Sir

(n) See 1 Ch. Cas. 190.

(o) *Benson v. Baldwyn*, 1 Atk. 508; and see *Bouverie* against *Prentice*, 1 Bro. C. C. 209.

(p) *Duke of Leeds v. Powell*, 1 Ves. 171.

(q) *Ib.* 172; and see *Smith v. Duke of Northumberland*, 1 Cox 363.

(r) *The Attorney-General v. Fullar-*

ton, 2 Ves. and Bea. 264, 5; and see *Redesd. Tr. Pl.* 94. Ed. 3, and the cases there cited.

(s) See *Mullineux v. Mullineux*, Toth. 101. *Spyer v. Spyer*, Nels. 14.

(t) Reg. Brev. 157 b.

(u) Reg. Brev. 157 b.

(x) *Speer v. Cawter*, 2 Meriv. 416.

(y) 2 Cox 360, S. C. 1 Eden. 331.

William Grant, Master of the Rolls, was likewise of opinion, that the circumstance of a confusion of Boundaries, furnishes, *per se*, no ground for the interposition of the Court (z), and refused to entertain a Bill of this description between two independent Proprietors, to force either to have his right so determined (a).

*31] *A Commission has been granted to ascertain boundaries, and if not to be distinguished, to set out the value, upon a Bill by a Prebendary against Lessees of the Prebendal Lands, also Owners of other Lands within the Parish, with which the Prebendal Lands had become intermixed and confounded, by reason of the unity of the possession (b); and on such Bill, it was held that the Prebendary is entitled to have as many Commissioners as his Lessees (c).

So, a Lord of a Manor may file a Bill for a Commission to distinguish Copyhold Lands within the Manor from Freehold, and compounded from uncompounded Copyholds, and to ascertain the Boundaries; and if they cannot be distinguished, to set out Lands of the Tenant of equal value with so much of the Copyhold Lands as cannot be distinguished (d). Though in cases of Bills to ascertain Boundaries the interest of one party is more inconsiderable than that of another, yet they must equally bear the expense of the Commission (e): unless, perhaps, where there has been fraud or neglect, by which the confusion of Boundaries has been occasioned.

Equity relieves against *Penalties*, and originally, it is apprehended, on the ground of accident. It relieves, for instance, against non-payment of money at a certain day (f), as in the common case of a bond for the payment of money, or of a Mortgage debt, where the Title of the Mortgagee has become absolute at *Law (g). So, in the case of an Estate sold by auction, there is a condition to forfeit the deposit if the purchase be not completed within a certain period; but the Court is in the constant habit of relieving against the lapse of time (h). Relief, however, in cases of Penalties, is dispensed only where the Court can do it with safety to the other party; for it seems if it cannot put him into as good a condition as if the agreement had been performed, the Court will not relieve (i). It will only relieve, where *the thing may be done afterwards*, or a *compensation*

(z) *Speer v. Cawter*, 2 Meriv. 418.

(a) *Ib.* 410, &c.

(b) *Willis v. Parkinson*, 2 Meriv. 507.

(c) *Willis v. Parkinson*, 1 Swanst. 9.

(d) *Duke of Leeds v. Earl of Strafford*, 4 Ves. 180. See *Spyer v. Spyer*, Nels. 14.

(e) *Norris v. Le Neve*, 3 Atk. 83.

(f) See *Grimstone v. Lord Bruce*, 2 Vern. 594. *Sir Henry Peachy and Duke of Somerset*, 1 Str. 453. *Sloman v. Walter*, 1 Bro. C. C. 419.

(g) *Lennon v. Napper*, 2 Sch. & Lefr. 685, Appendix.

(h) *Lennon v. Napper*, 2 Sch. & Lefr. 684, 5.

(i) *Rose v. Rose*, Amb. 332.

made for it (k) ; but unless a full compensation can be given, so as to put the party precisely in the same situation, a Court of Equity will not interfere ; for such a Jurisdiction would be arbitrary (*l*). There are some exceptions to this rule ; one of which is, where a *voluntary composition* is to be paid at a time certain, and in a certain manner. In such case, it is the voluntary bounty of the creditor to remit part of the debt, and the terms must be strictly complied with (*m*).

Where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of *the object is con- [*33 sidered as the principal intent of the Deed, and the penalty only as accessional, and therefore only to secure the damage really incurred : and in such cases, if the penalty of the bond is sued for at law, an injunction will be granted, and an issue, *quantum damnificatus*, directed (*n*).

It has been held, that if there be a mortgage at 5 per cent. with a condition to take 4 per cent. if regularly paid ; or a mortgage at 4 per cent. to have 5 per cent. if not regularly paid, the 5 per cent. is regarded in Equity only as a *penalty* to secure the 4 per cent. ; and the party is relieved from paying the 5 per cent. by paying the 4 per cent. and putting the other party in the same condition as if the 4 per cent. had been paid : that is, by paying him Interest on the 4 per cent. as if it had been received at the time (*o*). This position, however, in its full extent, does not seem warranted by the authorities ; and the rule rather appears to have been, that if money be lent on mortgage at 4 per cent. Interest, but if not punctually paid, then to pay Interest at the rate of 5 per cent. a Court of Equity will consider the 5 per cent. but as *nomine pænæ*, and relieve (*p*), unless there has been a long arrear of Interest (*q*), or a special agreement (*r*) ; but where Interest is reserved at 5 per cent. and if duly paid, 4 per cent. to be accepted, and it is not punctually paid, the Court will not relieve (*s*). *This appears to be the law, and is admitted as such by [*34

(*k*) 1 Chan. Cas. 24. *Cage v. Russell*, 2 Ventr. 352. *Descartott v. Bennett*, 9 Mod. 22. and *Northcote v. Duke*, 2 Eden 321. *Davis v. West*, 12 Ves. 475 ; and see *Wadman v. Calcraft*, 10 Ves. 97. *Hill and Barclay*, 18 Ves. 63.

(*l*) *Sanders v. Pope*, 12 Ves. 291. *Wafer v. Moccato*, 9 Mod. 112, 113 ; but see *Bracebridge v. Buckley*, 2 Price 200. *Rolfe v. Harris*, cited *Ib.* p. 206. *Reynolds v. Pitt*, cited *Ib.* 212, which cases seem in opposition to *Sanders v. Pope*.

(*m*) *Rose against Rose*, Ambler. 332 ; and see *Sewell v. Masson*, 1 Vern. 210. 1 Ch. Cas. 110. *Ex parte Bennet*, 2 Atk. 527. *Leigh v. Barry*, 3 Atk. 585. *Mackenzie v. Mackenzie*, 16 Ves. 372.

(*n*) *Sloman against Walter*, 1 Bro.

C. C. 418. *Hardy v. Martyn*, 1 Cox, 26. *Keating v. Sparrow*, 1 Ball & Bea. 374.

(*o*) *Seton v. Slade*, 7 Ves. 273, 4.

(*p*) *Holles v. Vyse*, 2 Vern. 290. *Strode v. Parker*, 2 Vern. 316. *Bonafons v. Rybott*, Burr, 1375 ; and see what Heath, Just. says in 2 Bos. & Pull. 353.

(*q*) *Brown v. Barkham*, 1 P. Wms. 652.

(*r*) *Stanhope v. Manners*, 2 Eden, 197.

(*s*) 2 Vern. 290. *Halifax and Higgins*, 2 Vern. 134. *Strode and Parker*, *Ib.* 316. *Jory v. Cox*, Prec. Ch. 160. *Nicholls v. Maynard*, 3 Atk. 520 ; and see 4 Bl. Comm. 432.

Lord Northington, who, however, observes, "I never heard, or could myself discover, the sense of this distinction (t)." The reason has been thought to be, because this latter agreement, though substantially the same, is not in the form of a Penalty (u).

Where a bond was given for the performance of covenants to build a bridge, which, from circumstances became impracticable, and the sum agreed for, was actually paid, an Injunction was granted to restrain an action on the Bond, and an Issue, *quantum damnificatus*, was ordered, the sum mentioned in the Bond being considered as a Penalty (x.)

The construction of Covenants is the same in Equity as at Law, but the performance of them is considered very differently in Courts of Law and Equity. At Law, a covenant must be strictly and literally performed; in Equity, it is sufficient if it be really and substantially performed according to the true intent and meaning of the parties, so far as circumstances will admit; and if by unavoidable accident, or by fraud, surprise, or ignorance not wilful, parties have been prevented from executing it literally, a Court of Equity will interfere, and upon compensation being made, the party having done every thing in his power, and being prevented by the means alluded to, will give relief. This doctrine was formerly *carried to a length that became in some degree alarming; terms and conditions of Covenants having been construed, as only in *terrorem*; but in modern times that has been much restrained; and it is now perfectly understood, that even in the purchase of an estate, if money has been covenanted to be paid at a given day, if it is not paid at the day, an action will lie; but if the party can show, that he took the means of paying it, and has been prevented by accidents not in his power, the Court of Chancery will dispense with the strict performance of it; because, as it was formerly said, it is not of the essence of the contract; but it may be of the essence of the contract; and the party cannot avail himself of equitable circumstances, unless he shows that there has been no wilful neglect or misconduct on his part (y).

Where, therefore, there was a Covenant in a lease for the renewal of the same, and the Lessee covenanted within six months next after the decease of any of the three persons for whose lives the Premises were granted, to give notice of the decease of such person, and accept a new Lease on certain terms, and the Lessee suffered two lives to drop before she gave notice and applied for a new Lease; it was held, that upon the death of the first Life, no notice being given, the Lessee's Covenant was not per-

(t) *Stanhope v. Manners*, 2 Eden, 199.

(u) See Arg. 2 vol. Hargr. Juris-consult Exercitationes, 218.

(x) *Errington against Aynesly*, 2

Bro. C. C. 341. See this case mentioned in *Davis v. Hone*, 2 Sch. & Lefr. 351.

(y) *Eaton v. Lyon*, 3 Ves. 692, 3.

Rolle v. Harris, 2 Price, 209.

formed, and that the Lessee forfeited her right of Renewal, and was not relievable in Equity (z).

In a case where, previous to what is usually called *Lord Stanhope's Act*, 37 Geo. 3. c. 45. a tender was *made, in *Bank* [*36 *Notes*, of Rent secured by covenant and from pique was refused, and payment in *Coin* insisted upon, and a distress made; a Bill was filed for relief on account of the great Scarcity of Coin, and the difficulty of procuring it, and for an Injunction in the mean time; but the Master of the Rolls, (*Sir William Grant*) sitting for the Chancellor, refused the Injunction, because he thought the Party could not be relieved against his covenant, and that to relieve him would be to assume a legislative authority (a):

But though the Court does in these and other cases relieve against a *Breach of Covenant*, there is no branch of the Jurisdiction of the Court more delicate than that which goes to restrain a legal right (b), and it has been termed, "a dangerous Jurisdiction" (c).

In cases of a contract by Lease to pay Rent, with a Covenant and clause of Re-entry on payment, a Court of Equity has, from the earliest times (d), relieved the Tenant on payment of the Rent, with Interest and all Expenses, and will not let him be turned out of possession (e); for in such cases, it is said (not convincingly perhaps) that the loss is certain, and may be recompensed by damages; but if the Lease were gained by fraud, or granted upon a false suggestion, Equity will not relieve the Lessee (f).

* Relief will, under circumstances be given upon a breach [*37 of covenant, by a Lessee, as to the mode of cultivation (g). So, relief has been given against a Forfeiture, and a right of Re-entry, incurred by not laying out, according to covenant, a specific sum in *Repairs*, in a given time (h). And in a case where the Tenant had omitted to keep the premises in repair, as he had covenanted to do, and an Ejectment was brought to the usual clause of Re-entry, and Possession taken, Relief was given (i). But *Lord Eldon* seems not to have concurred in these

(z) *Eaton v. Lyon*, 3 Ves. 690. *Bayley v. Corporation of Leominster*, 3 Bro. C. C. 590.

(a) *Bray v. —*, Seal, 25th June 1812. MS.; but see what is said in *Biddulph v. St. John*, 2 Sch. & Lefr. 534, 5.

(b) See *Sanders v. Pope*, 12 Ves. 282.

(c) *Hill v. Barclay*, 16 Ves. 406.

(d) There is a case in *Cary*, p. 55.

(e) *Francis's Max. in Equity*, p. 6. *Sanders v. Pope*, 12 Ves. 282. and see *Davis v. West*, 12 Ves. 475. *De Scarlett v. Dennett*, 9 Mod. 22. *Hill and Barclay*, 18 Ves. 58, 59, 60. *Lovat v.*

Lord Ranelagh, 3 Ves. & Bea. 30. *Wadman v. Calcraft*, 10 Ves. 67. and see *Taylor v. Knight*, Vin. Abr. tit. "Chancery," (V.) Ca. 31. The same Relief may be had at Law under the Stat. 4 G. 2. c. 28. s. 23, 4.

(f) *Cary*, 45.

(g) *Lovat v. Lord Ranelagh*, 3 Ves. & Bea. 29.

(h) *Sanders v. Pope*, 12 Ves. 282; and see *Brown and Quilter*, Ambl. 619. *Hannam v. South London Waterworks Company*, 2 Meriv. 65, in note; but see contra, *Bracebridge v. Buckley*, 2 Price's Exchequer Rep. p. 200.

(i) *Hack v. Leonard*, 9 Mod. 90.

decisions, or to admit that Relief could be administered, unless in cases of Accident and Surprise ; the effect of Weather for instance, or permissive want of repair, the Landlord standing by and looking on (*k*) ; and it seems clear that if the Tenant's conduct with reference to his covenant has been *gross and ruinous*, Relief would not be given to him (*l*) ; nor will relief be granted, if the Premises being much out of repair, and the Landlord making a requisition to repair, the tenant refuses to comply (*m*). Wherever, indeed, there has been a *wilful, voluntary, breach* of a Covenant, a Court of Equity will not relieve (*n*).

38*] Where there was a covenant in lease by the Tenant *to keep the Premises *insured*, and on default, a right of Entry was given, and the tenant omitted to insure, and an Ejectment was brought, and then the Tenant insured, and filed his Bill to be relieved ; the Lord Chancellor refused to enjoin the Landlord from proceeding in his Ejectment (*o*).

In one case, where the Lessee covenanted to pay the Rent, and to repair, and he, afterwards, made 100 Underleases, and the Rent was behind, and the premises out of repair, and the original Lease was avoided at Law, on account of the nonpayment of Rent, Relief against the Forfeiture was given in Equity, on a Bill filed by some of the under-lessees, and their payment of the Rent in arrear and repairing the houses, but the Court would not apportion the Rent, but held that such Lessees might compel the other under-lessees to contribute (*p*).

Notwithstanding some *dicta* (*q*) and a decision (*r*) to the contrary, it appears, at length, to be settled, that if a Tenant covenants to repair, damage by fire excepted, he cannot be relieved from the payment of Rent, if the Premises are destroyed by fire (*s*) ; but, it has been said, that if the Tenant in such case offers to surrender his Lease, the Court would relieve (*t*) ; but that seems questionable.

*39] *If a Covenant be to do, or not to do, some particular act, or doing it, or neglecting to do it, to pay a certain sum by way of *liquidated damages*, Courts of Equity will not relieve against the payment of such damages (*u*) ; as where there is a

(*k*) Hill and Barclay, 18 Ves. 62.

(*l*) See Hill v. Barclay, 16 Ves. 404.

(*m*) Hill v. Barclay, 18 Ves. 64.

(*n*) De Scarlett v. Dennett, 9 Mod. 22. Eaton and Lyon, 3 Bro. 693. Hill and Barclay, 18 Ves. 62. Reynolds v. Pitt, 19 Ves. 143.

(*o*) White v. Warner, 2 Meriv. 459. In Reynolds v. Pitt, 19 Ves. 143, the Lord Chancellor expressed doubts on the point, which however are now at rest by the decision adverted to.

(*p*) Webber v. Smith, 2 Vern. 103. See 16 Ves. 406.

(*q*) See Browne v. Quilter, Ambl.

619. Adopted by Lord Kenyon, in Cutter v. Powell, 6 T. R. 323.

(*r*) Steele and Wright, mentioned in Doe v. Sandham, 1 T. R. 708. Camden v. Moreton, cited from MSS. 2 Selwyn N. P. 414.

(*s*) Hase v. Groves, 3 Aust. 687. Holtzapffel v. Baker, 18 Ves. 115 ; and see on this subject, Belfour v. Weston, 1 Durnf. & East, 310. and the cases there mentioned.

(*t*) Cutter v. Powell, 6 T. R. 623.

(*u*) Roy v. Duke of Beaufort, 2 Atk. 194. Blake v. East India Company, Finch, 117. S. C. 2 Chan. Cas. 198.

nomine pænæ in Leases to prevent a Tenant from ploughing (x). So, if a Bond be taken in a penalty of 100*l.* with a condition that the Obligor should not kill a partridge, or if he did, that he should pay 5*l.*; the 5*l.* would be considered as liquidated damages (y). It is difficult in many cases to say what is to be considered as a Penalty, and what liquidated damages. Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a *Penalty*; but where it is agreed that if a party do such a particular thing, such a sum shall be paid by him, then the sum stated may be treated as liquidated damages (z). So, if a certain damage less than the penalty is made payable upon the face of the same instrument, in case the act intended to be prohibited be done, that sum shall be construed to be a penalty (a).

Where a bond is given not to defraud the Revenue,* such [*40 fraud is considered as a Crime, and for that reason the Court will not relieve (b).

Where a License is required to assign, an assignment without License cannot be relieved (c). If a License in writing be required, a Parol License is insufficient; but if a parol License is given as a snare, and under circumstances of fraud, the Court will relieve (d). Where a Lease contained a Covenant "that if the Lessees should let the Premises for any longer than three years, except to the wife or children of the Lessee, without License of the Lessor or his assigns first had, then the said Lease to be void," and the *Executor of the Lessee* sold the Lease for the payment of the debts of his Testator, the Plaintiff the purchaser, was relieved against the forfeiture (e). If there be a Covenant in a Lease against using Premises as a Shop, or Warehouse for any Trade, without License in Writing, and a Trade is carried on without such License, the Court will not relieve against an Ejectment. Nor would a License to carry on one Trade be considered as a general License to carry on any Trade (f).

If a *Right of Renewal* of a Lease be forfeited by *Laches* of

Rolle v. Patterson, 6 Bro. P. C. 470. 32.

Approved in Hardy v. Martin, 1 Cox, 27. Small v. Fitz-Williams, Prec Ch. 102. Ponsonby v. Adams, 6 Bro. P. C. 417. Astley v. Weldon, 2 Bos. and Pull. 348; and see dict. Street v. Rigby, 6 Ves. 818.

(x) Benson v. Gibson, 3 Atk. 395. Woodward v. Gyles, 2 Vern. 119. See dict. in Blake v. East India Co. 2 Chan. Cas. 199.

(y) Per Lord Eldon, in Astley v. Weldon, 2 Bos. and Pull. 352; and see Fletcher v. Dyche, 2 Term. Rep.

(z) Per Heath, Just. 2 Bos. and Pull. 353.

(a) Per Lord Eldon, Ib. 350.

(b) Benson v. Gibson, 3 Atk. 396.

(c) Lovat v. Lord Ranelagh, 3 Ves. & Bea. 31. Davies v. Moreton, 2 Chan. Cas. 127. 12 Ves. 292.

(d) Richardson v. Evans, 3 Madd. Rep. 218.

(e) Cox v. Browne, Chan. Rep. 170.

(f) Mancher v. Foundling Hospital, 1 Ves. and Bea. 138.

the Tenant (*g*), or wilful neglect or refusal (*h*), Courts of Equity will not relieve; but if the Lessee has lost his right by the *41] *fraud* of the Lessor, or **accident* on his own part, Equity will relieve (*i*). It will relieve where there is mere lapse of time unaccounted for, without misconduct in the Lessee, or where the Lessee has lost his right by fraud in the Lessor (*k*). Cases of this description have been very frequent in *Ireland* (*l*); where, it is said, *one seventh* of the whole Landed Property is held under renewable Leases (*m*); and it was found necessary to pass an act of Parliament (*n*), termed the *Tenantry Act*, by which the Tenant is on certain conditions relieved (*o*).

Where there was a Lessee of a Colliery at the rate of so much *per way*, and the Colliery became not worth working, the Lessee was relieved against the future Rent, and the Covenant in the Lease to work the Colliery, upon paying for all the Coal that could be got (*p*).

Conditions Precedent must, in general, be literally performed; and the Court will never vest an Estate where, by reason of a Condition Precedent, it will not vest in Law (*q*). In many cases it will relieve, to prevent the *divesting* of an Estate, but cannot *42] relieve *to give an Estate that never vested (*r*), unless the Re-mainder-men who were to take the Estate on non-performance of the Condition, have used any indirect practice or contrivance to prevent the performance of the Condition (*s*).

Where, therefore, there is a *conditional limitation* over in a given event, in such case (unless the Condition be for the payment of a *certain* (*t*) sum of Money (*u*), or such as the Court can put the Party in the same situation as if the Condition had been performed (*x*), and it is not contained in a voluntary settlement) (*y*), the breach of the Condition cannot be relieved (*z*).

(*g*) *Bayly v. Corporation of Leominster*, 1 Ves. jun. 476. S. C. 3 Bro. C. C. 529. *Baynham v. Guy's Hospital*, 3 Ves. 295.

(*h*) *Sweet v. Anderson*, 2 Bro. P. C. 430, recognised in *Lennon v. Napper*, 2 Sch. & Lefr. 686, Appendix.

(*i*) See the Irish cases in the house of Lords, *Rippon v. Rowley*, 1774. *Kain v. Hamilton*, 1776, 2 Ridgw. P. C. 490, in note. *Bateman v. Murray*, 1779, 2 Ridgw. P. C. 187. and for a History of these Decisions, see *Boyle v. Lysaght*, *Vernon and Scriven's Rep.* 135. and *Magrath v. Lord Muskerry*, *ib.* 166; and see on the subject *Lennon v. Napper*, 2 Sch. and Lefr. 689, Appendix.

(*k*) *Lennon v. Napper*, 2 Sch. & Lefr. 688.

(*l*) *Rawstone against Bentley*, 4 Bro. C. C. 415.

(*m*) See Arg. *Jackson v. Saunders*. 1 Sch. & Lefr. 447.

(*n*) 19 and 20 Geo. 3. c. 30.

(*o*) See a luminous interpretation of this Act, in *Jackson v. Saunders*, 1 Sch. & Lefr. 443, &c.

(*p*) *Smith v. Morris*, 2 Bro. C. C. 311.

(*q*) *Popham v. Bamfield*, 1 Vern. 83. *Lord Falkland v. Bertie* 2 Vern. 332. S. C. 3 Chan. Cas. 129. and 2 Freem. 220.

(*r*) 1 Vern. 339.

(*s*) *Cary v. Bertie*, 2 Vern. 344.

(*t*) If damages are contingent Equity cannot relieve, *Sweet v. Anderson*, 2 Bro. P. C. 430.

(*u*) *Wheeler v. Whitall*, 2 Freem. 9. *Wallis v. Crimes*, 1 Ch. Cas. 89. *Woodman v. Blake*, 2 Vern. 222. *Bertie v. Falkland*, 2 Vern. 339.

(*x*) *Taylor v. Popham*, 1 Bro. C. C. 168.

(*y*) *Bold v. Corbett*, Prec. Ch. 84. *Longdale v. Longdale*, 1 Vern. 456.

(*z*) *Lord Falkland v. Bertie*, 2 Vern. 333. *Clerk v. Lucy*, 5 Vin. 87.

Where an Estate was devised, upon condition that if the first Devisee should refuse or neglect to comply with the condition, viz. to release all demands upon the Testatrix, as Executrix of *A.* or otherwise established, within six months after her death, with a limitation over; this was held to be a *conditional limitation*, and a failure in not executing the release was held not to be relievable (*a*). Nor is Infancy allowed as an excuse for not performing a Condition Precedent. If such a condition is illegal (*b*), or is, or becomes, impossible, even by the act of God, the Estate will never arise, nor can Equity relieve (*c*).

*It is in general, different, as to *Conditions subsequent*; [*43 for though the Court cannot relieve against *all* conditions subsequent; yet where the Court can in any case compensate the party in damages for the “non-precise performance of the condition,” as Lord *Nottingham* expressed it, Equity will relieve (*d*). If such condition becomes impossible by the Act of God, the Estate will not be defeated or forfeited (*e*). The Rule is the same where the condition subsequent is unlawful (*f*).

In all those Cases in which a Court of Equity relieves against the legal effect of the *Breach of a condition*, it depends upon the question whether *compensation* can be made; for in all cases where a Person has broken a Condition and forfeited a Penalty, Equity will relieve if there can be a compensation (*g*). But if *compensation cannot be given*, and the value of the thing, for enforcing which the forfeiture is imposed, cannot be estimated, relief is denied (*h*).

Equity will relieve against forfeitures by Copyholders (*i*) or others, in consequence of permissive waste (*k*); but not, it seems, against wilful waste, though it admits of compensation (*l*).

Forfeitures, under the provisions of an Act of *Parlia. [*44 ment, or Conditions in Law (*m*) which do not admit of compensation, or forfeitures which may be considered as limitations of the Estate, and which determine it when they happen, cannot be relieved against. If, therefore, a Tenant for Life makes a greater estate than his own; or if a Tenant by Copy affects to convey a greater Estate than by Law he may, they forfeit their Estate, nor will Equity relieve (*n*).

(a) *Simpson and Vicker*, 14 Ves. 341. *Weedon v. Oxenden*, 8 July 1731. MS.

(b) Co. Lit. 206 a.

(c) *Cary v. Bertie*, 2 Vern. 340. *Graydon v. Hicks*, 2 Atk. 18.

(d) *Popham v. Bampffield*, 1 Vern. 83.

(e) *Lord Falkland v. Bertie*, 2 Vern. 339. Co. Lit. 206. 2 Bl. Comm. 156, 7.

(f) *Perkins*, Sect. 139.

(g) *Northcote against Duke*, Ambl. 514.; and see *Barnardiston v. Fane*, 2 Vern. 366.

(h) See *Hargr. Jurisconsult. Exercitations*, 2 Vol. 194.

(i) 1 Str. 447.

(k) *Sir H. Peachy v. Duke of Somerset*, Prec. Ch. 572, 3.

(l) *Thomas v. Porter*, 1 Ch. Ca. 96. Pre. Ch. 547. *Fra.'s Maxims*. p. 6. and 1 Str. 447. But see *Northcote v. Duke*, Ambl. 511. *Nash v. Lady Darby*, 2 Vern. 537.; cited 1 Fonb. Eq. 396, in note. *Bishop of Worcester and others* 2 Freem. 137.

(m) *Keating v. Sparrow*, 1 Ball & Beatty, 373, or *Nesbit v. Tredennick*, lb. 478.; & see *Peachy v. Duke of Somerset*, 1 Str. 447.

(n) *Sir H. Peachy v. Duke of Somerset*, 1 Str. 452. S. C. Pre. Ch. 574.

Relief is sometimes given in cases of forfeiture of Copyholds ; but where a Copyholder has long refused to do suit, or service, or to repair (*o*) ; and where he has granted Leases without license, relief has been refused (*p*).

It is to be observed, that in all those cases where Penalties are inserted in a case of nonperformance, this does not release the Parties from their Agreement, but they must perform it notwithstanding, and have an option to pay the Penalty and be released from the performance of the Agreement (*q*).

The interposition of Courts of Equity against Marriage conditions, in cases of Legacies, may perhaps be considered as arising out of its power to relieve against Penalties and Forfeitures ; but however this may be, the doctrine on this subject will *45] be more conveniently *considered when we come to treat of *Legacies*.

Relief has been refused against a Forfeiture, under a *By Law of an incorporated Company for Waterworks*, whereby it was provided, that the Members shall receive notice of the Default in paying a call, and incur a forfeiture by nonpayment ten days after the notice sent ; though it appeared that the lapse arose from an accidental ignorance of the call (*r*).

So, it seems, as to Contractors for Government Loans, if a Party fails to make a Deposit, he cannot be relieved in Equity ; (*s*) and relief in such case has been refused on an application to Parliament (*t*).

If a Bill has been filed waiving a forfeiture, and, on that ground, seeking relief in a Court of Equity, though the Plaintiff fail in obtaining that Relief, he will be restrained from insisting on the Forfeiture at Law (*u*).

It is in general true, that it is not in the power of the Court to relieve against Accidents which prevent *voluntary dispositions* of Estates (*x*) ; but in a great case it was resolved that, if a man make a Conveyance with a power of Revocation in the presence of four Privy Counsellors, and he is sent by the King to Jamaica, where that circumstance becomes impossible, Equity will allow him to revoke it, without such presence (*y*).

*46] Where a man has an *election*, within a limited *period, to settle Lands or pay Money, and the Party dies, and the Testator's affairs are for some time in confusion, nothing, it is said, is

(*o*) *Cox v. Higford*, 2 Vern. 664.

(*p*) *Sir H. Peachy v. Duke of Somerset*, Pre. Ch. 568.

(*q*) *Christ's Hospital v. Pugh*, Dom. Proc. 20 March 1727. *Howard v. Hopkins*, 1 Atk. 371. *Chilliner v. Chilliner*, 2 Ves. 528. and see *Hobson v. Trevor*, 2 P. Wms. 191. sed vid. *Woodward v. Eyles*, 2 Vern. 119. a case of liquidated damages ; as to which see 1 Swanst. 318 n. (*a*.)

(*r*) *Sparks v. The Company and Proprietors of the Liverpool Waterworks*, 13 Ves. 428.

(*s*) *Ib.* 434.

(*t*) *Ib.* 435.

(*u*) *Bond v. Hopkins*, 1 Sch. & Lefr. 441.

(*x*) *Whitton v. Russel*, 1 Atk. 449.

(*y*) *Bath and Montague*, 3 Ch. Ca. 69.

more usual, than for the Court to enlarge the time, or relieve against any lapse of it (z).

If the Master of an Apprentice becomes a Bankrupt (a) or dies (b), these, it has been holden, are *Accidents*, in respect of which the Court has jurisdiction, to order a return of part of the Apprentice Fee; but if the Master and Apprentice agree that the Apprentice shall be discharged from his Apprenticeship, there is no jurisdiction, on the ground of Accident, to order a return of part of the Apprentice Fee (c).

The mere circumstance of a *death* is not that species of Accident against which the court relieves, (unless in the cases just adverted to;) but where the Plaintiff was prevented from recovering in Ejectment by a Rule of a Court of Law, and by an Injunction at the instance of the Occupier, who ultimately failed both in Law and in Equity, an Account of Mesne Profits was decreed against the Executors of the Tenant (d).

A bill will not lie to be relieved against the Condition of a Bottomry Bond, the same not having been performed in some small circumstances (e).

An Administrator being in possession of several houses, and much more than sufficient to pay debts *and legacies, paid [*47 them as they were demanded, and afterwards, by the fire of London, several of the Houses were destroyed, which constituted the greatest part of the Assets, and then, a Debt on a Bond being claimed, the Administrator was in Equity relieved (f).

There were twenty years arrear of a Rent-charge, and Cattle came by escape out of the next ground, and were distrained, &c.; but Lord Nottingham relieved the Parties, in respect of this Accident (g).

If, after a Lease made to A., the Lessee assigns to B. and B. assigns to C.; if any Rent was due from B. previous to his assignment to C., as A. could not recover it at Law from B., for want of privity of Estate, A. may file his Bill in Equity, for the Money due from B (h).

Having noticed the leading principles of the decisions in respect to Accident, we now proceed to consider the doctrines of Courts of Equity in respect of

Mistake.

It has been an uniform Rule in Equity before, as well as after

(z) Eastwood v. Vinke, 2 P. Wms. 617.

(a) See Hale against Webb, 2 Bro. C. C. 80.

(b) See Newton v. Rowse, 1 Vern. 460; but see what is said Fonbl. Treat. Eq. 1 vol. 372, in note.

(c) Hale & Webb, 2 Bro. C. C. 78.

(d) Pulteney v. Warren, 6 Ves. 73.

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(e) Anon. V. Abr. tit. "Condition."

(f) Croft v. Lindsey and Colvil, 2 Freem. 1.

(g) Brodon v. Pierce, cited Prec. Ch. 8. and in 2 Vern. 131.

(h) Philpot v. Hoare, 3 Atk. 219. S. C. Amb. 219. Treach v. Coke, 1 Vern. 165.

the Statute, 43 Elizabeth, c. 4. that where Uses are *Charitable*, and the Person has in himself full power to convey, the Court will aid a defective conveyance to such Uses. Though, therefore, Devises to Corporations were void under the Stat. Hen. VIII. yet they were always considered as good in Equity, if made to Charitable Uses (i).

*48] *A Conveyance was defective, the use being limited to certain Officers of a Corporation, and not to the Corporate Body, and therefore there was a want of Persons to take in perpetual succession; but the Court under the Stat. of Elizabeth relieved against the mistake (k).

The Statute of Charitable Uses supplies all defects of an Assurance which the Donor was capable of making (l). Even a Devise by a Lunatic to Charitable Uses has been considered as good, under the Statute of Charitable Uses (m)!

If a Tenant in Tail devises Lands for the Maintenance of a Schoolmaster and other Charitable purposes, it is a good appointment within the Statute of Charitable Uses, though no Fine was levied, or Recovery suffered. The intent of the Act, says the Lord Keeper *Wright*, was to make the disposition of the Party as free and easy as his mind, and not to oblige him to the observance of any form or ceremony, either of Lease or Release, common Recovery or Fine (n).

A Court of Equity will not supply a *Mistake* in a *Fine* after the death of the Conuzor (o), nor rectify a mistake of Names in a *Recovery*, especially after a length of time and against a Purchaser (p). Nor will it relieve against an erroneous *Recovery*, in the Lord's Court (q).

*49] *The Court of Common Pleas often interferes to amend a *Fine*, on a *Recovery*, where there has been a *clear mistake*; but that court has refused to alter a recovery by substituting one joint tenant to the præcipe for his companion (t). And where the tenant should have appeared in *Hilary* term, and he did not appear till *Easter* term, the Court would not permit the appearance to be entered as of *Hilary* Term (u); and *Gibbs, C. J.* observed, "It would be better if indulgences of this description were granted in no case; but certainly it should be done but very rarely (x)."

(i) *Attorney General v. Tancred*, 1 Eden, 14.

(k) *Attorney General v. Tancred*, 1 Eden, 10, et seq.

(l) *Attorney General v. Burdett*, 2 Vern. 755. *Tay v. Slaughter*, Prec. Ch. 16. *Attorney General v. Rye*, 2 Vern. 453.

(m) *Collison's case*, Heb. 136.

(n) *Attorney General v. Rye*, 2 Vern. 454.

(o) *Wharton v. Wharton*, 2 Vern. 3. Whenever *Vernon* is quoted it is from

the last edition of that work, by Mr. Raithby, which is rendered so very valuable by his great research and accuracy.

(p) *Bell against Candall*, Amb. 103.

(q) *Ash v. Rogle*, 1 Vern. 367.

(t) *Buswell and others*, 4 Taunt. 101.

(u) *Buzard and others*, 4 Taunt. 587.

(x) *Ib.* p. 590. See a variety of cases too numerous to quote, in *Taunton's Reports*, where *Fines* and *Recoveries* have been amended.

Where a deed is made on *good consideration*, (it is different where the Conveyance is *voluntary* (y), unless it be in favour of a *Wife*, or a legitimate *Child*) (z), (1) Equity will supply a *defect* in the execution (a); (2) the Court having equal Jurisdiction to relieve in respect of a plain mistake in contracts in Writing, as against frauds in Contracts (3): so that if reduced into Writing contrary to the intent of the Parties, on *proper *proof*, [*50 that will be rectified (b). By proper proof, is meant, "reasonable presumption," as some say (c), and as others have said, "strong irrefragable evidence (d)." (4) And it is an essential ingredient to any relief under this head, that it should be on an accident perfectly distinct from the sense of the Instrument (e).

If a Bargain and Sale be made, and it is not enrolled within six months, Equity will compel the Vendor to make a good title by executing another Bargain and Sale, which may be enrolled (f).

If a *defective conveyance* be made, as a mortgage in Fee by

(y) *Pickering v. Keeling*, 1 Ch. Rep. 78. *Bonham v. Newcombe* 2 Vent. 365. *Lee v. Henley*, 1 Vern. 37, contra. *Watts v. Bullas*, 1 P. Wms. 60; but that case disapproved in *Goring v. Nash*, 3 Atk. 188; and see *dictum* in *Williamson v. Codrington*, 1 Ves. 514.

(z) *Vane v. Fletcher*, 1 P. Wms. 354. *Bonham and Newcombe*, 2 Vent. 365. *Thomson v. Attfield*, 1 Vern. 40. In *Cold v. Corbett*, Prec. Ch. 8, the court seem to have thought it had a discretion as to relieving a mistake in a voluntary conveyance, *sed quæ*. That the child must be legitimate

to have relief, see *Watts v. Bullas*, 1 P. Wms. 60.

(a) *Anon.* 2 Freem. 256; but see the doubt expressed in *Halton's case*, 2 Leon. 2d part, p. 8.

(b) *Henkle v. Royal Exchange Assurance Company*, 1 Ves. 317. *Langley v. Browne*, 2 Atk. 203.

(c) 2 Atk. 33.

(d) *Shelburne v. Inchiquin*, 1 Bro. C. C. 341. 344. *Burt v. Barlow*, 3 Bro. C. C. 454. and see *Marq. Townshend v. Stangroom*, 6 Ves. 335. 338, 9.

(e) *Shelburne v. Inchiquin*, 1 Bro. C. C. 350.

(f) *Curtis v. Perry*, 6 Ves. 745.

(1) Vide *Minturn v. Seymour*, 4 Johns. Ch. Rep. 497.

(2) The want of a seal may be supplied. *Wadsworth v. Wendell*, 5 Johns. Ch. Rep. 224. And so, if a deed, through mistake or fraud, be attested by an incompetent witness, chancery will supply the defect. *Smith v. Chapman*, 4 Conn. Rep. 344. And if, by mistake, a deed be vouched by one witness only, when the statute requires two, chancery will supply the defect in favour of a grantee *bona fide*, not only against the grantor, but also against a subsequent purchaser with notice. *Watson v. Walls*, 5 Conn. Rep. So, if a deed be acknowledged before a justice of the quorum, when it should have been done before a judge of the common pleas, chancery will correct the error. *Desell v. Casey*, 3 Des. 84.

(3) A mistake in a deed, as to the quantity of land conveyed, may be corrected: And the fact of the mistake may be proved by parol, though it be denied in the answer. *Gillespie v. Moon*, 2 Johns. Ch. Rep. 585.

So, where it was agreed between the parties to a deed, that it should be executed as a mortgage, but, by mistake, was executed as an absolute deed, a court of chancery will treat it as a mortgage. *Washburn v. Merrill*, 1 Day, 139.

And also where the date of a promissory note, and the name of the payee, referred to in the condition of a mortgage, were misdescribed by mistake, it was held, on a bill for foreclosure, stating such mistake, that it might be corrected, not only as between the parties to the deed, but as between the mortgagor and a subsequent mortgagee with notice. *Peters v. Goodrich*, 3 Conn. Rep. 146.

(4) The proof of a mistake in a written instrument, must be clear and certain, otherwise a court of chancery will not interpose its aid. *Lyman v. The United Ins. Co.* 2 Johns. Ch. Rep. 630. S. O. on appeal, 17 Johns. Rep. 373. *Getman's Exrs. v. Beardsley*, 2 Johns. Ch. Rep. 274.

Feoffment, *without livery*, Equity will make good this defective Conveyance, and this, though, after such incomplete Feoffment, a Judgment is confessed to a third person, whose debt did not originally affect the land (*g*). Where a Rent was settled upon a Woman by way of Jointure, but she had no power of distress, or other remedy at Law, the payment according to the intent of the Conveyance, was decreed in Equity (*h*). And a defective conveyance will not only be made good against the Party, but also as against his *Assignees* (*i*) or *Representatives* (*k*). (1)

*51] *Where a Copyhold was mortgaged, but the Surrender not having been presented within the time limited by the Custom, was void, and the Mortgagor afterwards became a Bankrupt, such defective Surrender was, on a bill filed against his Assignees, in effect made good; for the Assignees were directed to pay the Plaintiff his Principal, Interest and Costs, or to be foreclosed (*l*). Cases proceeding on the same Principle are numerous (*m*). But where certain formalities in Conveyances are required by *Act of Parliament*, and these are omitted, the Court cannot remedy the omission: as, for instance, where the Instrument wants the necessary stamps (*n*). So, where a Bill of Sale of a Ship was made as a collateral Security, and the Papers, &c. were delivered, but there was no recital in the Bill of Sale of the Registry, as is required by the 26th Geo. III. c. 60, *Lord Thurlow* held it could not be supplied in Equity (*o*), and thought he could no more reform the Title, where the Interest was derived under the party's own act and contract, not executed in the terms of the Statute, than he could reform an Annuity Deed not according to the Annuity Act (*p*).

Mistakes in Deeds are sometimes remedied by the *construction* given to them; for it is a general Principle that where a Man *52] has expressed a clear *and manifest intention to dispose of his Estate, *and he mistakes the mode* of so doing, yet, if the

(*g*) *Burgh and Francis*, Eq. Cas. Abr. 1 vol. p. 320, cited arg. 1 P. Wms. 279. S. C. under the name of *Burgh v. Burgh*, Finch 28; but see what Mr. Fonblanque observes on this case, *Treatise of Equity*, 1 vol. p. 37, in note, Edit. 2d.

(*h*) 1 Ch. Rep. 5.

(*i*) *Taylor v. Wheeler*, 2 Vern. 564; and see 1 Atk. 162. *Cripps v. Jee*, 4 Bro. C. C. 472.

(*k*) *Morse v. Faulkner*, 1 Anst. 14.

(*l*) *Taylor and Wheeler*, 2 Vern. 564.

S. C. Salk. 449.

(*m*) See *Dale and Smithwick*, 2 Vern. 151.

(*n*) See what is said in *Toulmin v. Price*, 5 Ves. 240.

(*o*) *Hibbert against Rolleston*, 3 Bro. Ch. Cas. 571; and see *Speldt v. Lechmere*, 13 Ves. 588. *Ex parte Yallop*, 15 Ves. 60.

(*p*) See what Lord Eldon says in *Curtis and Perry*, 6 Ves. 745, and *Mestaer and Gillespie*, 11 Ves. 626.

(1) So where a guardian's bond was taken in the name of *the people*, instead of the infants' name, the mistake was corrected, even as against the surety, the intention being manifest. *Wiser v. Blachly*, 1 Johns. Ch. Rep. 607.

So, where a person intending to make a family settlement of his estate, in nature of a testamentary disposition, made several deeds to his sons of certain parcels of land, and the deed to one of them proved defective, by reason of an important erasure, Chancery, after the death of the grantor, will compel his heirs and widow to perfect the title of the grantee, *M'Call v. M'Call*, 3 Day, 402.

instrument can be considered as valid, in point of substance, so as to effectuate the intent of the party, its informality shall be overlooked, and the deed take effect, if by law it can (*q*): as where a man makes a feoffment to a relation and his heirs, and he neglects to make livery of seisin, it is obvious that he meant his relation should take it by a common conveyance; but he cannot do so for want of that formality, and therefore it shall operate as a *covenant to stand seised*, and the Estate passes by the Statute of Uses, and not by the Common Law, so as to support the intention of the party, *ut res magis valeat quam pereat* (*r*); but it has been held that if a Trust of Land be limited to A. his Heirs and Assigns, or to such as he or they shall appoint, and *cestui que trust* devises these Lands by a Will, attested by two Witnesses only, the Will is void; and it will be allowed to operate as an *Appointment* (*s*).

Conveyances by *Bargain and Sale* enrolled, which (money making no part of the consideration) could not operate by way of bargain and sale, have been allowed, in respect of the intent of the parties, to operate by way of *covenant to stand seised*; the consideration allowing of such construction (*t*).

*Defects in the *Execution of Powers* have, from a very [*53 early period (*u*), been relieved against in Equity, and in Equity only (*x*), and upon the same Principle upon which relief is given in the case of defective Surrenders of Copyholds (*y*), which will be more particularly noticed hereafter.

If, therefore, a *Power* is executed for a *valuable consideration*, but defectively, a Court of Equity will supply the defect, and this against a Remainder-man, or one not claiming under the Power (*z*). It would be otherwise if the execution were *voluntary* (*a*).

So, where a Power was to be executed in Writing, in the presence of *three* Witnesses, and it was executed, *in consideration of Marriage*, in the presence of *two* Witnesses only, the defective execution was supplied (*b*).

In an early case, where one having a power to grant a Lease in *possession*, granted, for a valuable consideration, a Lease to commence in *futuro*, Equity relieved (*c*); but in a very recent

(*q*) The leading case on this head is *Crossing v. Seudamore*, 1 Ventr. 137. *Franklin v. Franklin*, E. T. 7 Geo. II. 1733, MS.

(*r*) *Habergham against Vincent*, 4 Bro. C. C. 382. *Thompson v. Attfield*, 1 Vern. 40.

(*s*) *Wagstaff v. Wagstaff*, 2 P. Wms. 258.

(*t*) See 2 Fonbl. Eq. p. 47. n. b, and the cases there cited.

(*u*) See *Pollard v. Greenvil*, 1 Cha. Cas. 10.

(*x*) *Gooday v. Butcher*, 9 Ves. 394.

The contrary doctrine in *Zouch v. Woolston*, 2 Burr. 1136, has long been considered as untenable. See 1 Sch. & Lefr. 66.

(*y*) *Watts v. Bullas*, 1 P. Wms. 60. *Chapman v. Gibson*, 2 Bro. C. C. 229.

(*z*) *Cotter v. Layer*, 2 P. Wms. 623.

(*a*) *Cotter v. Layer*, 2 P. Wms. 624.

(*b*) *Wilkie v. Holmes*, stated in 1 Sch. & Lefroy, p. 60. n. a. S. C. 1 Dick. 165: *Wade against Paget*, 1 Bro. C. C. 368.

(*c*) *Pollard v. Greenvil*, 1 Chan. Cas. 10.

decision it was held that such a Lease is bad in Equity (*d*), as it certainly is, at Law (*e*).

*54] So, where a Power was given to settle on a wife, *Lands not exceeding 400*l.* a-year, and, on Marriage, the party covenanted to settle 400*l.* a-year, *clear of taxes and reprises*, and a settlement was afterwards made of Lands, with covenants that if they should fall short of 400*l.* a-year the party would make up the deficiency; it was held that the settlement was intended as an execution of the power; and the making it a clear 400*l.* a-year was a mistake, and relievable (*e*).

It has been held at Law, that where a Power was given to Trustees, with the consent of the *cestuis que Trust*, testified by *writing under their hands and seals*, attested by two or more credible Witnesses, to make sale of Lands, it was not well executed, the attestation being only as to the *sealing and delivery* in the presence of two Witnesses; nor will an attestation added after many years, witnessing the *signing, sealing, and delivery*, at the time of making the Deed, supply the defect (*f*).

This decision seems to have occasioned the passing of the Act, 54 Geo. 3. c. 168, commonly called the *Deeds Attestation Act*; by which it is enacted, that deeds already made with the intention to exercise any power, authority or trust, or to signify the consent or direction of any person, whose consent or direction may be necessary, shall, if duly signed and executed, and in other respects duly attested, be of the same validity and effect *as if an attestation of signature had been subscribed*. By the second clause, this enactment is extended to deeds already made in exercise of powers, authorities and trusts, &c. but with a provision, that it shall not extend to revive deeds already *avoided, or to interfere with claims released within six months after the passing of the act, wanting any formality in the attestation, are to have the same force and effect as if the act had not been made. It is observable that this act has no prospective operation; and that, in order to render deeds hereafter made, valid, or at least to prevent any doubt as to their validity arising from such a defect, it is necessary in the attestation to say, "signed, sealed and delivered," instead of the common practice, which gave rise to the act, of only inserting "sealed and delivered" in the attestation.

Generally, it is a Rule, that the *Non-execution* of a Power cannot be supplied, though a *defective Execution* may (*g*). A *non-execution* is where nothing is done; a *defective execution* is where the Power has not been executed according to the terms of the

(*d*) *Bowes v. Waterworks Company*, 11 Ves. 477.

3 Madd. Rep.

(*e*) *Doe v. Calvert*, 8 East 376.

(*e*) *Ambl.* 424.

(*f*) *Wright v. Wakeford*, 4 Taunt. 213.
Mansfield, Ch. J. dissenting; and see

(*g*) *Tollet v. Tollet*, 2 P. Wms. 490.
Holmes v. Coghill, 7 Ves. 499, and 13
Ves. 206. and what is said in *Hixon v.*
Oliver, 13 Ves. 114.

Power, but where it has been intended to execute it, and that intention is sufficiently declared, but the Act declaring the intention is not an execution of the Power in the form prescribed; and there the defect is supplied in Equity (*h*). As where, in the Execution of a Power, there was a mistake as to the time at which the Interest should commence, relief has been given (*i*). So where one having a Power by Deed or Will to charge Lands for the benefit of younger children, sent *Instructions* for a Conveyance *to charge them with younger children's portions, [*56 Equity relieved (*k*).

But though the legal effect of the *Non-execution of a Power* is, that the property would go to a third person; yet if the Court can see that the Power is *coupled with a Trust, to the execution of which the party looked with confidence*, the Failure or Negligence of the Trustee will not be permitted, in Equity, to disappoint those objects (*l*). This seems now an acknowledged Principle in Equity, though some of the earlier cases are not easily reconcilable with it, and in particular the case of the *Duke of Marlborough v. Lord Godolphin* (*m*).

It is not necessary to recite, in order to execute, a Power, if it clearly appears that the Party meant to execute it, and the Will applies to the subject of the Power (*n*); but if the execution of a Power by Will, of *personality*, if the intention does not appear on the face of the Will, it is clearly settled that the Court cannot go out of the Will; and admit evidence, for instance, to show the inability to satisfy out of the Testator's own property the dispositions he has made, notwithstanding the Court may be satisfied it was the Party's intention to execute the Power (*o*). In cases as to the execution *of a Power over *Real Estate* [*57 by Will, the Court may, in the absence of a reference to the Power, collect from the face of the Will, and *extrinsic* evidence, an intention to execute it. The Court is at liberty to examine into the Testator's Property, for the purpose of ascertaining whether he has any Real Estate of his own on which the devise may operate (*p*). Where, therefore, A. by Will gave Real Estate, and also Personal Estate, consisting partly of household furniture, linen, and plate, to such persons as B. should by

(*h*) *Shannon v. Bradstreet*, 1 Scho. & Lefroy, p. 62, 3.

(*i*) *Probert v. Morgan*, 1 Atk. 440.

(*k*) *Smith v. Ashton*, 1 Cha. Cas. 264.

(*l*) See on this Subj. on Powers, p. 315. *Dax v. Whitbread*, 16 Ves. 26. S. C. MS. *Brown and Higg*, in its several stages, 4 Ves. 708. 5 Ves. 495. 8 Ves. 561. S. C. confirmed on appeal to House of Lords in 1813; see also *Harding v. Glyn*, 1 Atk. 469, stated also 5 Ves. 501. 8 Ves. 571.

(*m*) 2 Ves. Sen. 61. S. C. stated from Reg. Lib. 5 es. 506.

(*n*) *Probert v. Morgan*, 1 Atk. 440.

Andrews v. Emmot, 2 Bro. C. C. 297.

Benet v. Aburrow, 8 Ves. 616. *Brad-*

ley v. Westcott, 13 Ves. 453. *Dillon v.*

Grace, 2 Sch. & Lefr. 465.

(*o*) *Jones v. Tucker*, 7 Ves. 400.

Jones v. Curry, 1 Wils. C. C. 29, S. C. 1 Swanst. 66.

(*p*) *Standen v. Standen*, 2 Ves. jun. 589, affirmed in the House of Lords. See 3 Ves. 310. 761, and 6 Bro. P. C. 193. Toml. Edit. *Jones v. Curry*, 1 Wils. C. C. 31.

Will appoint, and B. by her Will, attested so as to pass Real Estates, gave "all my Estate and Effects of whatsoever denomination," to certain persons, subject to certain legacies, and an annuity, and also gave "my household furniture, linen and plate," but without any particular reference to the Power, or to the Property subjected to it; it was held that this was not a good execution of the Power, either as to the Real or Personal Estate; and that parol Evidence was not admissible to show that B. had not personal Estate of her own to satisfy the bequest, but that such evidence would be admissible as to the Real Estate, had a clear intention to pass Real Estate been apparent on the Will (q).

A Court of Equity will supply a *defective Execution of a Power*, as well in the case of *younger Children*, and a provision for a *Wife*, as in favour of *Purchasers*, or *Creditors* (r); but will *58] not relieve a *defective execution of a Power by a Wife in favour of her Husband (s); and in the case of a Wife or a Child it has never entered into the view of the Court, whether the provision was voluntary or not (t). In numerous cases upon jointering Powers particularly, it has been determined that a Covenant is a sufficient declaration of an intent to execute (u); and it is the same, even where a Covenant is made before the power arises, as where a Power is limited to be exercised by Tenant for life *in possession*, and he covenants *when he comes* into possession he will execute: in all those cases Courts of Equity have relieved (x).

It has been thought difficult to account for the interference of Courts of Equity, to supply defects, in favour of a child, in cases of Powers, since the attempt to execute a Power by Will is no more than an intimation that the party means to execute it; but if all the requisite ceremonies have not been complied with, it cannot be supposed that the intention continued until his death (y).

*59] In an early Case, it was held, that a Court of *Equity can no more let a man in, to defeat an Estate upon a Power of Revocation, without a due execution of the Power, than the common Law could let a man in to defeat an Estate upon con-

(q) Jones v. Curry, 1 Wilson 24, S. C. 1 Swanst. 66.

(r) Hervey v. Hervey, 1 Atk. 563. Tollet v. Tollet, 2 P. Wms. 490. Coventry v. Coventry, 2 P. Wms. 222, and S. C. in Str. 596; and very fully given at the end of Max. in Equity; the last case; Sergison v. Sealey, 2 Atk. 415. Menzey against Walker, For. 77. Wilkie v. Holme, 1 Dick. 165, and see Shannon v. Bradstreet, 1 Scho. & Lefr. 60. Harington v. Haste, 1 Cox 131.

(s) Moodie v. Reid, 1 Madd. 516.

(t) 1 Atk. 567.

(u) Shannon v. Bradstreet, 1 Scho. & Lefr. 63; and see the cases quoted by Mr. Fonbl. Treatise of Equity, p. 313, in note, such as Fothergill v. Fothergill, 2 Freem. 256. Clifford v. Burlington, 2 Vern. 379. Coventry v. Coventry, 2 P. Wms. 222. Sarth v. Backfry, Gilb. 166. Vernon v. Vernon, Ambl. 3.

(x) Shannon v. Bradstreet, 1 Sch. & Lefr. 63.

(y) Vid. Finch and Finch, 15 Ves. p. 51; and see what is said in Holmes v. Coghill, 7 Ves. 506, and 12 Ves. 212, &c.

dition without performance of the condition; or than a Court of Equity can let a man in to defeat a voluntary Conveyance without a Power of Revocation; for it is a condition which must be performed, or no advantage taken of it (z).

Where under a Power of Appointment among children it is defectively executed by a Will, if the children have Legacies under the Will they are put to their Election (a).

It is observable, that according to the opinion of *Lord Mansfield*, Courts of Equity, in the treatment of Powers, originally in their nature legal, follow the Law. "Powers," he observed, "by a Tenant in Tail, to make Leases under the Statute, if not executed in the requisite form, will not admit of relief in Equity. So, with respect to Powers under the Civil List Act, Powers under particular family entails, Equity can no more relieve from them than it can from defects in a Common Recovery. There is nothing in these cases to bind the conscience of the Remainder-man (b)." In later cases, however, it has been holden, that if a Lease under a Power be granted for a *valuable consideration*, a Court of Equity will relieve against a formal defect in the Lease (c).

*Mistakes in the execution by Will of Powers have been [*60 endeavoured to be remedied by a peculiar construction of such Wills. Hence the doctrine of *Cy pres*, in regard to *excessive executions of powers by Will affecting Real Estates*. But this doctrine of *Cy pres* does not apply to *personalty* (d). Under a power to appoint to Children, an appointment by Will to a Child for Life, with remainder to the Children, is not valid, and the excess (the remainder to the children) is void; but this remainder is not considered as unappointed and to go accordingly, but the Court will appoint it *Cy pres*, as near the intention of the giver of the Power as possible, and consider the child as taking an Estate-tail (e). This doctrine of *Cy pres* has not, however, been much approved, and has gone, *Lord Kenyon* observes, "to the utmost verge of the Law (f);" and *Lord Eldon* has said, "it is not proper to go one step farther (g)."

Where there is an excess in an appointment under a Power executed by *Deed*, the doctrine of *Cy pres* is not applicable, as in the case of *Wills* (h); but, in such case, the appointment under the Power is void, so far as relates to the excess. Where, therefore, the Power was to appoint to Children, and an appoint-

(z) 3 Cha. Cas. 67.

(a) *Whistler v. Webster*, 2 Ves. Jun. 367.

(b) *Earl of Darlington v. Pulteney*, Cowp. 367.

(c) *Doc v. Willer*, 7 T. R. 478, and see *Campbell v. Leach*, Amb. 740.

(d) *Routledge v. Dorril*, 2 Ves. jun. 364. *Leake v. Robinson*, 2 Meriv. 379.

(e) See *Pitt v. Jackson*, 2 Bro. C. C.

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51. *Griffith v. Harrison*, 3 Bro. C. C.

410. *Smith v. Lord Camelford*, 2 Ves. Jun. 711. and see on this subject *Harg.* and *Butt. Co. Lit.* 271 b. n. 1.

(f) *Brudenell v. Elwes*, 1 East. 451.

(g) *Brudenell v. Elwes*, 7 Ves. 390.

(h) *Ibid.* 382. S. C. 1 East. 451. *Adams v. Adams*, Cowp. 651. 1 Ves. 390.

ment was made by Will to a Child for Life, and after his decease *61] to his Wife and Children, with a *limitation over, if he should have no Wife or Children at his death, to an object of the Power, the appointment to the Child for Life was held to be clearly good, but the gift after his death to his Wife and Children was considered as void (*i*), they not being objects within the meaning of the Power; but the limitation over to the object within the Power was held to be good, and capable of taking effect, if the Son left no Wife or Children at his death (*k*).

If there be a power to lease for twenty-one years, and the person leases for forty years, this, in Equity, is void only for the surplus, and good within the limits of the Power (*l*).

Under this Jurisdiction in cases of *Mistake*, Settlements of *Real* or *Personal* Estate will be reformed, if they be not according to the intention of the *Articles* upon which they are founded (*m*).

If a *Settlement* executed subsequent to Marriage, purporting to be in execution of Articles entered into before Marriage, does not take the effect, though it follows the words of the Articles; the Court will, on the ground of mistake (*n*), rectify that error in the frame of the Settlement (*o*): nor is length of time any bar to such relief (*p*).

*62] *In these cases of *Articles* before Marriage, the Court says, such and such Words in Articles are taken to denote such an intent; and the Conveyance must be according to the intent so manifested (*q*).

Articles therefore, before Marriage, containing limitations, which according to the strict legal operation of the words would give the parents (*r*), or either of them (*s*), such an Estate-tail as would enable the Father alone, during the coverture, or the surviving parent afterwards, to bar the Issue of the Marriage under a legal Settlement, limiting the Estate in the same words, Equity will rectify it, and order a strict Settlement, unless the Issue is otherwise provided for than by the Limitation to the Heirs, &c. in the Articles (*t*), by an equivalent in a Settle-

(*i*) In *Duke of Devonshire v. Cavendish*, mentioned 2 T. R. 245, a power to appoint to children was construed to extend to grandchildren; but that case has not been followed; see *Crompe v. Barrow*, 4 Ves. 684.

(*k*) *Crompe v. Barrow*, 4 Ves. 681.

(*l*) *Hervey v. Hervey*, 1 Atk. 569. *Campbell v. Leach*, Ambl. 740. See also *Parker v. Parker*, Gilb. Eq. Rep. 168, decided on same principle, and *Pawey v. Bowen*, 1 Cha. Cas. 98. That such lease would be bad at law, see *Roe on demise*, *Brune v. Prideaux*, 10 East. 187.

(*m*) *Randall v. Willis*, 5 Ves. 373.

(*n*) *Mitford's Pleadings*, 117.

(*o*) *Randall v. Willis*, 5 Ves. 273.

(*p*) *Honor v. Honor*, 1 P. Wms. 123. S. C. 2 Vern. 658.

(*q*) *Brudenell v. Elwes*, 7 Ves. 390.

(*r*) *Trevor v. Trevor*, 1 Eq. Abr. 387, and S. C. 1 P. Wms. 622. S. C. on appeal 2 Bro. P. C. 122. *Cusack v. Cusack*, 1 Cro. P. C. 470. *Villiers v. Villiers*, 2 Atk. 73.

(*s*) *Streatfield v. Streatfield*, Cas. Temp. Talb. 176. *Jones v. Laughton*, 1 Eq. Ab. 392. *Nandick v. Wilkes*, 1 Eq. Abr. 393. C. 5. Gilb. Rep. 114. *Bask v. Dalway*, 3. Atk. 531.

(*t*) *Chambers v. Chambers*, Fitg. 127. S. C. 2 Eq. Abr. 35.

ment made after marriage (u), or from other limitations or provisions in other Lands, it appears that the Party knew and intended the distinction (x); or the Settlement be in favour of an illegitimate child (y), or where there has been a purchaser for a valuable consideration without notice (z), or the Articles cannot be produced (a).

The general principle upon which Courts of Equity *in- [*63 terpose to carry Marriage Articles into execution by way of strict Settlement, notwithstanding the Articles themselves are not penned in that manner, is, that Articles made in consideration of and previous to Marriage, are considered as *heads of Agreement*, or short notes to be afterwards drawn out at length according to the usual course of Settlements (b), and that a provision for the issue of the marriage is one of the great and immediate objects of this agreement; and, consequently, a principal intention of such agreement must be to secure such a Settlement as shall contain an effectual provision for that Issue: which end, it is clear, cannot be answered in any degree by a Settlement so framed as to leave it in the power of either Parent alone to bar their Issue by Fine or Recovery. The Issue in these cases are considered as claiming a provision in the capacity of Purchasers for a valuable consideration, under the purport and intention of the stipulated terms upon which that marriage was engaged, and which gave them birth (c).

The Court, however, will not interfere if both Articles and Settlement are made before Marriage (d), unless the Settlement in such case be expressed to be made *in pursuance of the Articles* (e); for otherwise the *Court will suppose that the Parties [*64 had altered their intention with respect to the terms of the Marriage; which they may before the Marriage, though not afterwards, and that the settlement was made in pursuance of such new agreement and not of articles. But when it is said to be made "in pursuance of the articles," all room for such a supposition is precluded (f). But there is no case, except where

(u) *Glanville v. Payne*, 2 Atk. 40. S. C. Barn. 18.

(x) *Chambers v. Chambers*, Fitz. 127. 2 Eq. Abr. 35. C. 4. *Howell v. Howell*, 2 Ves. 358.

(y) *Gilb.* 139.

(z) *Fearne on Contingent Remainders*, 108. *West and Errissey*, 2 P. Wms. 349. *Warwick v. Warwick and Kniveton*, 3 Atk. 291. *Pritchard against Quinchant*, Ambl. 148. *Cardwell v. Mackrill*, Ambl. 515.

(a) *Cardwell v. Mackrill*, Ambl. 515.

(b) *Taggart v. Taggart*, 1 Sch. and Lefr. 87; and see 2 Atk. 545. 5 Ves. 275.

(c) *Fearne on Remainders*, p. 111, 112; and see the terms of Lord Har-

court's decree in *Papillon and Voice*, 2 P. Wms. 474, in note 1. *Blackburn v. Stables*, 2 Ves. & Bea. 370.

(d) *Legg v. Goldwise*, For. 20.

(e) *West v. Errissey*, 2 P. Wms. 349. This is the first case in which the Court altered the Settlement, and made it conformable to the articles, and relieved on the head of mistake. According to *Peer Williams*, the House of Lords, in this case, ordered the estates to be limited to the daughter in tail female; but in 3 Bro. P. C. 336, it appears they directed the limitation to be in tail general. See 3 Atk. 293. *Portyn against Roberts*, Ambl. 317. *Roberts v. Kingrley*, 1 Ves. 239.

(f) See *Fearne on Contingent Re-*

there are articles, as well as settlement, that the Court will construe words which create a legal Estate-tail, to be carried into execution by a strict settlement (g).

And where the limitation in the articles gives an Estate-tail to the wife alone, in an estate derived from the husband, the settlement must be accordingly ; because in such case it is not in the power of either of the Parents *alone* to bar the Issue, either during or after the coverture ; for the husband takes no Estate-tail, and cannot therefore bar the Issue of the marriage ; and the wife cannot, during the coverture, do it without his concurrence ; and her Estate-tail being *ex provisione viri*, the Stat. of Hen. VII. prevents her doing it afterwards. And it has been held that their power of doing it jointly is not unreasonable, or inconsistent with the probable view and intent of the settlement (h). But this doctrine does not, it seems, apply to *copyhold* estates ; for the *65] *statutes of Hen. VII. and the 32 Hen. 8. c. 28, do not extend to them (k).

Where, in *articles*, it is agreed to convey to the issue of the marriage, "*whether Sons or Daughters*," they take, *as tenants in common* (l) ; and if the Estate is a fee simple, or probably if it is only a Freehold, the settlement, it seems, would be upon the children as Tenants in Common in Tail with cross remainders ; and if it is a mere Chattel Interest it would be limited to them absolutely as Tenants in Common, with a Limitation over in case any of them die under twenty-one, and without Issue (m).

And though a limitation by articles, to the heirs male of the marriage, after an express estate for life to the father, shall be taken to mean a Remainder to the *first*, &c. son, it does not follow that such a limitation to the heirs male of the Body must be equivalent to a Remainder limited to daughters (n), and entitle them to a provision in the rectified settlement.

An elder daughter is, in the execution of articles, accounted a younger child ; and a deed founded on articles would be rectified to that effect (o) ; but there is no case where the Court has considered a younger child as an eldest, but between parent and children, or those who stand *in loco parentis* (p).

*66] *Where a term for raising portions was placed *after* an

mainders, last edition, from page 80 to p. 107, where the whole subject is admirably discussed, and most of the cases are noticed.

(g) Warrick v. Warrick, 3 Atk. 294.

(h) Fearn on Remainders, 84. and see Highway against Banner, 1 Bro. C. C. 284. Brudenell v. Elwes, 7 Ves. 290. Honor v. Honor, 1 P. Wms. 123. Whately v. Kemp, 2 Ves. 358. Green v. Ekins, 2 Atk. 477. S. C. 3 P. Wms. 306.

(k) See Mr. Butler's Note to Fearn

Contingent Remainders, 114. n. X. to last Edition.

(l) Taggart v. Taggart, 1 Sch. & Lefr. 84.

(m) *Ib.* and see Ward and Bradley, 2 Vern. 23.

(n) Powell v. Price, 2 P. Wms. 539 ; but see contra Burton v. Hastings, Gilb. Rep. 113. West and Errissey, 2 P. Wms. 349. Hart v. Middlehurst, 3 Atk. 371.

(o) See Heneage v. Hunlocke, 2 Atk. 457.

(p) Hall against Hewer, Amb. 204.

estate-tail, but should have been *before*, the Court has rectified the mistake (*q*). So a Settlement has been reformed according to the intention as declared in the *recital* (*r*).

A Settlement has been reformed in favour of the younger children against the Heir of the Mother claiming a Reversion, upon a letter from her written long after the Settlement, stating what her intention was (*s*).

By the 55 Geo. III. c. 192, it is enacted, "That in all cases where by the Custom of any Manor in *England* or *Ireland*, any Copyhold Tenant of such Manor may by his or her Will dispose of or appoint his or her Copyhold Tenements, the same having been surrendered to such uses as should be declared by such Will, every disposition or charge made or to be made by any such Will, by any person who shall die after the passing of this Act (12th July, 1815), of any such Copyhold Tenements, or of any right, title, or interest in or to the same, shall be as valid and effectual to all intents and purposes, although no Surrender shall have been made to the use of the Will of such person, as the same would have been if a Surrender had been made to the use of such Will."

In consequence of this statute there is no necessity of applying to a Court of Equity to supply a Surrender *to the use [⁶⁷ of a Will. But as the statute applies only to Wills made *since* the passing of the Statute, it is still necessary to advert to the doctrines of Equity respecting the supply of a Surrender.

A Court of Equity will supply the want of a Surrender of a Copyhold Estate, in favour of a Purchaser for a valuable consideration, against the party who ought to have made the Surrender, or his Heir (*t*). A mortgagee, therefore, who is considered as a Purchaser *pro tanto*, may have a Surrender supplied, and even against a subsequent Purchaser if he had notice of the Mortgage (*u*). A Surrender will not, however, be supplied against the Heir, in the case of a voluntary Conveyance (*x*).

If a Testator has by his Will, expressed a clear, unequivocal intention (*y*), to pass a Copyhold, or a limited Interest in a Copyhold (*z*), a remote reversion only (*a*); but has omitted to make a Surrender to the use of his Will, the Court will supply the Surrender, if the devise of the Copyhold is in favour of

(*q*) *Uvedale v. Halfpenny*, 2 P. Wms. 151, adopted in *Heneage v. Hunlocks*, 2 Atk. 45; and see 2 Ves. 334.

(*r*) *Payne v. Collier*, 1 Ves. Jun. 171. *Doran v. Ross*, 1 Ves. Jun. 59. S. C. 3 Bro. C. C. 28.

(*s*) *Barstow v. Kilvington*, 5 Ves. 593; *Heldsworth v. Cradock*, Rolls, 1806, MS.

(*t*) *Barker v. Hill*, 2 Ch. Rep. 218.

(*u*) *Jennings v. Moore*, 2 Vern. 609, S. C. on appeal. 2 Bro. P. C. 278. *Patterson v. Thompson*, Finch, 272.

(*x*) *Vane v. Fletcher*, 1 P. Wms. 354.

(*y*) *Kightley v. Kightley*, 2 Ves. Jun. 332.

(*z*) See *Marston against Gowan*, 3 Bro. C. C. 170.

(*a*) *Cook v. Arnham*, 3 P. Wms. 287.

Creditors (*b*), a Wife (*c*), or younger Children (*d*); but the *68] Court will not supply a Surrender in favour *of Grandchildren (*e*), or illegitimate children (*f*), or a Sister of the Testator (*g*). The principle on which relief is administered, seems to be, that wherever a man having Power over an Estate, shows an intention to execute such Power, in discharge of natural or moral obligations, the Court will operate upon the conscience of the Heir, to make him perfect that intention (*h*). The idea of supplying a Surrender was, originally, a bold one; and seems to have arisen out of some of the very extraordinary decisions upon the *Statute of Charitable Uses* (*i*), 43 Eliz. c. 4. At first, it seems, the Court supplied the defect in favour of Creditors, and then extended the doctrine in favour of *younger Children*, upon the idea, that younger children unprovided for must be considered as creditors (*k*).

A defective Surrender is not supplied in favour of Creditors, except where it is absolutely necessary for the payment of debts, and they would, otherwise, be unpaid. If, therefore, *Freehold and Copyhold* Estates be charged by a Will with the payment of *69] debts; so long as any Freehold Estate remains *applicable to that purpose, a Surrender of the Copyhold will not be supplied, notwithstanding the express intention of the Testator to charge the Copyhold rateably with, or even in preference to, the Freehold (*l*). But this is to be understood of the *legal* estate only; for an *equitable* Estate of Copyhold will pass by such devise without Surrender (*m*); as, not having the legal Estate, the Testator could not surrender (*n*).

(*b*) *Car v. Ellison*, 3 Atk. 77. *Pope v. Garland*, 3 Salk. 84. The doubt expressed in 2 Freem. 65, has been long overruled.

(*c*) In *Roome v. Roome*, 3 Atk. 182, it was doubted whether this equity extended to a wife; but in *Hawkins and Leigh*, 1 Atk. 387, it was held it did.

(*d*) Anon. 2 Freem. 115; and see 234. *Hardham v. Roberts*, 1 Vern. 132. *Pope v. Garland*, 3 Salk. 84.

(*e*) As to grandchildren, see *Kettle and Townshend*, 1 Salk. 187. decided by Lord Somers, but reversed in House of Lords; see Show. P. C. but this reversal has been disapproved. See *Hills v. Downton*, 5 Ves. 565. *Watts v. Bullas*, 1 P. Wms. 61, and note; and see *Chapman against Gibson*, 3 Bro. C. C. 231; but adhered to by Lord Eldon *v. Whitehead*, 6 Ves. 544; and see 2 Ves 582. *Elton v. Elton*, 3 Atk. 508. *Goodwin and Goodwin*, 1 Ves. 228.

(*f*) *Crickett v. Dolby*, 3 Ves. 12. *Bramhall v. Hall*, Ambl. 467. S. C. 2 Eden. 220.

(*g*) *Goodwin v. Goodwin*, 1 Ves. 228.

(*h*) *Chapman against Gibson*, 3 Bro.

C. C. 230, and see *Hills v. Downton*, 5 Ves. 564. *Tollet and Tollet*, 2 P. Wms. 489.

(*i*) See *Duke's Charitable Uses*, and what is said in *Rumbold v. Rumbold*, 3 Ves. 69; and the remarkable decision there alluded to.

(*k*) So said in Arg. in *Whitcombe v. Whitcombe*, Prec. Ch. 282; and see *Hills v. Downton*, 5 Ves. 563.

(*l*) *Mallabar v. Mallabar*, For. 78. *Ithell v. Beane*, 1 Ves. 215. *Drake v. Robinson*, 1 P. Wms. 443. *Hellier v. Tarrant*, in Addenda to 3d edition of *Forrester*, p. 287, etc. and the cases there mentioned, and *Growrock v. Smith*, 2 Cox 397; but see *Bixby against Eley*, 2 Bro. C. C. 325.

(*m*) *Macnamara v. Jones*, 1 Bro. C. C. 482. *Gibson v. Lord Mountfort*, 1 Ves. 489. *Allen v. Poulton*, 1 Ves. 121; & see *Hawkins v. Leigh*, 1 Atk. 388. *Macey v. Shurmer*, 1 Atk. 390. *Car v. Ellison*, 3 Atk. 75. *King v. King*, 3 P. Wms. 358.

(*n*) *Tuffnell v. Page*, 2 Atk. 38. S. C. Barn. 6.

The want of a Surrender will be supplied in favour of *Creditors*, if there be general words used in the devise, such as, "*messuages, lands, tenements, and hereditaments*," though the Copyhold Estates are not expressly mentioned (o); but it will not on such words supply a Surrender in favour of a *Widow*, or *younger children* (p).

Surrenders will be supplied in case of a Deed or a Will (q) in favour of *younger children*, but they must be unprovided for (r) unless by the Will under which *they claim the Copyhold [*70 (s), and a provision must have been made for the heir, either by the father or a stranger, it being unimportant by *whom* or *how* he is provided for (t), whether by settlement, or in any other way (u); and the Court will not enter into a consideration of the *quantum* of the provision (x); but some provision *it seems*, there must be (y), and that it should exist at the time when the Bill is filed (z). This doctrine, however, is not applicable to any heir but a child (a), or, as it seems, a *grandchild* (b); it does not apply to a *collateral heir* (c), or *hæres factus* (d).

*If the heir mortgage the Copyhold to one, without notice of the devise, and there have been *laches* in the devisee, the surrender will not be supplied as against such mortgagee (e).

(o) Vid *Drake v. Robinson*, 1 P. Wms. 442; and see also *Hazlewood v. Pope*, 3 P. Wms. p. 322. *Lindopp against Eborall*, 3 Bro. C. C. 189. *Kidney v. Cousmaker*, 12 Ves. 157. In *Milbourne v. Milbourne*, 1 Cox 247, Sir Lloyd Kenyon, M. R. said, alluding to *Drake v. Robinson*, "I cannot understand Lord Macclesfield's distinction between the sons and creditors, but it is now certainly established."

(p) See *Byas v. Byas*, 2 Ves. 164.

(q) *Rodgers v. Marshall*, 17 Ves. 295.

(r) *Lindopp v. Eborall*, 3 Bro. C. C. 189. Mr. Coxe in his note to *Watts v. Bullas*, 1 P. Wms. 60, seems to think that it is unimportant whether the younger child is unprovided for or not, and see *Tudor v. Anson*, Ves. 420.

(s) *Cooke v. Arnham*, For. 36, S. C. 3 P. Wms. 283, and also in MS. under title of *Cooke v. Arnold*. *Sampson v. Sampson*, 2 Ves. and Bea. 339, 340. *Ross v. Ross* 1 Eq. Cas. Abr. 124. *Milbourne v. Milbourne*, 1 Cox 247.

(t) *Pike against White*, 3 Bro. C. C. 288.

(u) *Hawkins v. Leigh*, 1 Atk. 380. but see 3 Atk. 183.

(x) *Cooke v. Arnham*, 3 P. Wms. 283. S. C. MS. *Burton v. Floyd*, 6 Vin. 66. pl. 20. *Garn v. Garn*, 16 Ves. 268.

(y) *Ibid.* and see *Chapman v. Gibson*, 3 Bro. C. C. 229. *Hawkins v. Leigh*, 1 Atk. 388. *Macey v. Shurmer*, 1 Atk. 390; and see *Briscoe v. Cartright*, Gilb.

Eq. Rep. 121. *Hicken v. Hicken*, Vin. Abr. tit. "Copyhold," M. A. Ca. 20. p. 59. There has been a difference of opinion, whether a surrender is to be supplied for the wife against an heir, unprovided for, when that heir is the son of the devisor? Lord Alvanley thought, in such case, it ought not to be supplied; [*Chapman v. Gibson*, 3 Bro. 229.] Lord Rosslyn, on the contrary, thought that the Court ought never to enter into the consideration whether the heir was provided for; [*Hills v. Downton*, 5 Ves. 557,] but in neither case was the point decided, there being only a collateral heir in the former case, and the heir was provided for in the latter; but according, it seems, to the opinion of Sir William Grant, M. R. it would not be supplied against a son, or even a grandson, who was an unprovided heir. See *Rodgers v. Marshall*, 17 Ves. 294. and the observations of Lord Alvanley on *Hills v. Downton*, Sugden on Powers, Appendix, No. 6. p. 550. 1st Edit.

(z) *Cooper v. Cooper*, 2 Vern. 265. S. C. 2 Freem 17. Prec. Ch. 32.

(a) *Chapman v. Gibson*, 3 Bro. C. C. 230.

(b) *Rodgers v. Marshall*, 17 Ves. 297.

(c) *Chapman v. Gibson*, 16 Ves. 92. *Fielding v. Winwood*, 16 Ves. 90.

(d) *Smith v. Baker*, 1 Atk. 386.

(e) *Weeks v. Gore*, Vin. Abr. tit. "Copyhold," (M. A.) Cas. 24. 6 Vin. 67.

A Surrender will in some cases be supplied in favour of an eldest son ; as in a case of Gavelkind Copyhold, where the intent of the Will appears to be, that the eldest son should have the Copyhold, paying a legacy thereout to the younger son (*f*).

Where the want of a Surrender is supplied for *creditors*, an account will also be directed of the *rents* and *profits* from the time the copyhold estates are held to pass ; for, from that time the customary heir is a mere trustee ; and this, though the heir be an infant (*g*) ; but in the case of a *younger child* guilty of great *laches* in not asserting his claim, (as for fourteen years,) an Account was decreed only from the time of filing the bill (*h*).

The Plaintiff, where a Surrender is supplied, usually pays the costs (*i*).

In cases where there are *joint* bonds the Court has in causes, as well as in bankruptcy (*k*), sometimes inferred from the nature of the condition and the transaction, that it was made joint, by *mistake*, and has rectified it (*l*) ; decreeing, in a cause, that a *72] new bond shall be executed *joint* and *several* ; and in *cases of bankruptcy, that proof shall be made accordingly : it being supposed in these cases that the bond, though joint only, was *intended* to be both *joint* and *several* (*m*). But a joint Covenant of several, growing out of no antecedent liability in all or any of the Covenanters to do what they have thereby undertaken, will not in Equity be considered as a joint and several Covenant (*n*). A Partnership debt has been treated in Equity as the several debt of each Partner, though at Law it is only the joint debt of all (*o*) ; but these all have had a benefit from the Money advanced or the credit given ; and the obligation to pay exists independently of any instrument by which the debt may have been secured. So where a joint bond has in Equity been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It was not the Bond that first created the liability to pay (*p*). And though in cases of Partnership, where Partners enter into a *joint* contract, not joint and several, Courts of Equity have held, that it must be taken as the *joint* and *several* Bond of the Partners, and there is a remedy against the assets of one deceased ; there may, however, be subsequent dealings of such a nature, so as to shift the equitable obligation to pay from the deceased Partner (*q*).

(*f*) Bradley v. Bradley, 2 Vern. 163, and the cases mentioned in note to Watts and Bullas, 1 P. Wms. 60.

(*g*) Kidney v. Coussmaker, 12 Ves. 158.

(*h*) Cook v. Arnham, 3 P. Wms. 288, in note 1 ; and S. C. MS.

(*i*) Banks v. Denshaw, 3 Atk. 587, S. C. 1 Ves. 63.

(*k*) See ex parte Symonds, 1 Cox 200.

(*l*) Simpson v. Vaughan, 2 Atk. 33.

(*m*) Underhill v. Horwood, 10 Ves. 227, 8.

(*n*) Sumner v. Powell, 8 Meriv. 30.

(*o*) Ib. p. 37. Orr v. Chase, 1 Meriv. 730.

(*p*) 2 Meriv. 37.

(*q*) Vid Gray v. Chiswell, 9 Ves. 118. ex parte Kendall, 17 Ves. 514. Primrose v. Bromley, 1 Atk. 90 ; and see Devaynes v. Noble, 1 Meriv. 564, &c.

It has been holden that a *Mistake of Parties as to *the* [*73 *Law*, is not a ground for reforming a deed founded on such mistake, and generally speaking, it is so (1). As where an Annuity was granted, but no power of redemption contained in the deed, it being mistakenly thought by the parties it would make the transaction usurious, relief was refused (r). So where one, having a power of appointment and revocation, executed the power of appointment, but mistaking the Law did not in the deed reserve a power of revocation, conceiving that a deed might be altered or revoked, though no power of revocation had been reserved; and it was held the mistake could not be relieved (s). Whether ignorance of law will entitle a party to open an account, has however been doubted (t).

If two persons are bound in a joint obligation, and the obligee release one of them, not supposing that he thereby discharged the other, as, in Law, he does; yet the rule, *ignorantia juris non excusat*, applies, and Equity will not interfere (u).

So, where a *Copyhold* was devised to A. for life, with remainder to his first and other sons in tail, reversion to D. in fee. A.'s wife being *privement enseint* of a son, he was advised to buy the reversion in fee from D., and take a surrender to his own use, which he was told would merge his estate for life, and destroy the contingent remainder, there being then no issue born. He accordingly bought the reversion *of the remainder-man. [*74 This transaction proceeded altogether on a mistake of the *Law*; for the freehold and inheritance being in the lord, that protected the contingent remainder. A. brought his bill under these circumstances, to be relieved against the security given to the reversioner for the purchase of the reversion, he being under a mistake; but the court refused to relieve him (x).

There are, however, several cases in which a party has been relieved from the consequences of acts founded on ignorance of Law (y); and in one case (z) it was said, that the maxim "*ignorantia juris non excusat*," was in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but does not hold in civil cases. Ignorance, however, is not mistake (a), and

(r) Lord Irnham against Child, 1 Bro. C. C. 92; and see Lord Portmore against Morris, 2 Bro. C. C. 219.

(s) Worral v. Jacob 3 Meriv. 271.

(t) Langstaffe v. Fenwick, 10 Ves. 406.

(u) Harman v. Camm. 4 Vin. 387.

(x) Mildmay v. Hungerford, 2 Vern. 243.

(y) See Lansdowne v. Lansdowne,

Mos. 364. Pusey v. Desbouvere, 5 P. Wms. 315. Pullen v. Ready, 2 At. 591. and what is said of that case in Stockley v. Stockley 1 Ves. & Bea. 30. Jones v. Morgan, 1 Bro. C. C. 219. Gee v. Spencer, 1 Vern. 32; and see Perrott v. Perrott, 14 East 440.

(z) Lansdowne v. Lansdowne, Mos. 364.

(a) 5 Ves. 14.

(1) The principle alluded to in the text, has been fully recognised in the State of New-York. Shotwell v. Murray, 1 Johns. Ch. Rep. 516. Storrs v. Barker, 6 Johns. Ch. Rep. 166. Lyon v. Richmond, 2 Johns. Ch. Rep. 61.

relief cannot be given on a *supposition* merely that parties are ignorant of the legal effect of their acts. If, for instance, a tenant for life pays off an encumbrance, and takes a release of the debt which he paid off, it cannot be contended he meant to continue it as a subsisting debt ; or if a tenant for life, by planting or otherwise, improves his estate, such improvements are not claimable, as distinct from the freehold.

Nor will mistakes of Judgment be relieved against. If an Agreement or Composition of a cause be made, the Court will *75] not upon the question whether either *party is in the right or wrong, overturn such agreement, if made by parties with their eyes open, and rightly informed (b). Parties entitled in different events may, while the uncertainty exists, each taking his chance, effect a valid compromise (c).

And where deeds have been executed to establish the peace of a family (d) ; or where there has been a purchaser for a valuable consideration (e), though parties may have acted under a mistaken apprehension of their rights, relief has been refused.

But in general, Agreements relating to real or personal estate, if founded on Mistake, will for that reason be set aside. As where a person entitled to a share in the distribution of the personal estate of an intestate, makes an agreement under the supposition that the distributive share is of such a value, and it turns out that the share is of greater value, a court of Equity will set aside an Agreement originating in such a mistake (f).

So, where A. purchased an estate of B., which, in fact, was the estate of A.,—A. was allowed, on the ground of mistake, to have the purchase-money refunded, though there was no fraud in B. who apprehended he had a right to the estate (g).

*76] And in such cases, it seems, a Mistake may be *taken advantage of, even after a lapse of time, (seven years, for instance) (h), but not after a long acquiescence under the mistake, and neither party aware of it (i).

Another very hard case illustrates the principle :—A Mortgage Deed came into the hands of an executor, who received the money secured by the mortgage, and paid it away to his testator's creditors. It afterwards appeared that the mortgage had been satisfied in the testator's life-time. A bill was filed against the executor, to be relieved for this over-payment, and relief was decreed, although the money had been paid away by the exe-

(b) *Browne v. Pring*, 1 Ves. 408.

(c) *Dunnage v. White*, 1 Swanst. 151, 2.

(d) *Frank v. Frank*, 1 Ch. Cas. 84 ; but see this case doubted in *Leonard v. Leonard*, 2 Ball and Beatty 182 ; and see *Stockley, v. Stockley*, 1 Ves. & Bea. 23. *Stapilton v. Stapilton*, 1 Atk. 10. *Roche v. O'Brien*, 1 Ball & Beatty 354.

(e) *Warner v. Watkin*, 2 Atk. 8.

(f) *Cocking and Pratt*, 1 Ves. Sen. 400.

(g) *Bingham v. Bingham*, 1 Ves. 126 ; and see *Leonard v. Leonard*, 2 Ball and Beatty, 183.

(h) *East v. Thornbury*, 3 P. Wms. 125.

(i) *Nicholls v. Leeson*, 3 Atk. 573. *Vaughan v. Thomas*, 1 Bro. C. C. 556.

cutor, and the executor was driven to sue the creditors whom he had, through mistake, paid (*k*).

But where both parties have been mistaken, and the fact about which they were mistaken was, from its nature, doubtful at the time of the agreement, and equally unknown to both parties, a court of Equity has refused relief. As where there was a contract for a piece of ground, which was about to be enclosed, for 20*l.*, and it turned out to be worth 200*l.*, yet neither party knowing the value, although the contract was to be performed *in futuro*, a specific performance was decreed (*l*).

It has also been determined, that if *A.* knowing there to be a Mine in the estate of *B.* of which he knew *B.* was ignorant, should enter into a contract *to purchase the estate of *B.* [*77 for the price of the estate, without considering the mine, the contract will not be set aside (*m*). It is essentially necessary, in order to set aside such a transaction, not only that a great advantage should be taken, but it must arise from some obligation in the party to make the discovery (*n*) ; which brings it to a case of *fraud*. (*1*)

If instruments be delivered up by mistake, and owing to ignorance of a transaction which would have made it conscientious to hold the instrument, and proceed at Law, a court of Equity will relieve (*o*).

Equity will not relieve against misleading (*p*), or the inattention of parties in a court of Law, as by neglecting a proper defence (*q*), or to move for a new trial (*r*) in proper time. But if a plaintiff, at Law, recovers a debt against the defendant, and the defendant afterwards finds a receipt under the plaintiff's hand, or that the plaintiff's own book appears to be crossed, Equity will relieve (*s*) ; and this seems reasonable, inasmuch as the courts of Law would not, in such case, grant a new trial (*t*).

But though a court of Law will not grant a new Trial merely to enable a party to get fresh witnesses to prove his case, nor

(*k*) *Pooley and Ray*, 1 P. Wms. 354.

(*l*) See the case cited by the Lord Chancellor in *Mortimer and Capper*, 1 Bro. C. C. 158.

(*m*) *Fox v. Mackreath*, 2 Bro. C. C. 420. S. C. 2 Cox 321.

(*n*) *Ibid.*

(*o*) *East India Company v. Donald*, 9 Ves. 275.

(*p*) *Stephenson v. Wilson*, 2 Vern.

325. *Blackhall v. Combs*, 2 P. Wms. 72.

(*q*) *Ware v. Horwood*, 14 Ves. 23.

Curtis v. Smalldridge, 1 Chan. Cas. 43.

(*r*) *Bateman v. Willoc*, 1 Sch. & Lefr. 201.

(*s*) *Countess of Gainsborough v. Glifford*, 2 P. Wms. 426; but see *Barbone v. Brent*, 1 Vern. 176.

(*t*) See *Marriott v. Hampton*, 7 T.

R. 269.

(1) So where a suit at law was brought against two persons, as partners, and a judgment was recovered ; but the plaintiffs were unable to obtain satisfaction ; and the plaintiffs, afterwards, discovered for the first time, that three other persons were dormant partners with the defendants, and jointly interested in the transaction out of which the cause of action arose, it was held, that the plaintiffs were without remedy against the dormant partners. *Penny v. Martin*, 4 Johns. Ch. Rep. 566.

would a Court of Equity interfere on such a ground, because it would be an opening to perjury, after the party saw where the *78] *cause pinched, yet, *where the admission comes from the party himself upon a Bill of Discovery filed after the Trial*, it is very different, and the Court will in such case relieve (u).

And, where in an action against a bankrupt, he, for want of his commission, was unable to support his plea of a certificate, he was relieved, and a perpetual injunction granted (x).

So, where a defendant failed at Law for want of proving a copy of a judgment, a perpetual injunction was granted, the matter being such as was examinable in Equity, as well as at Law (y).

A Bill in Chancery was brought by a Defendant at Law, in an action upon an *indebitatus* assumpsit, on the ground, that allowances which ought in justice to have been made to him at the Trial were not made; and Lord Hardwicke inclined to relieve (z). Cases of this description afford a ground to move for a new Trial, a more expeditious and proper remedy (a).

In regard to *Mistake by Arbitrators*, it has been holden, that if an Arbitrator in his award make a plain mistake, either in the Law, or in fact (b), as where an Arbitrator miscalculates (c), or when the judgment is right but the premises are wrong (d), a 79*] *bill in Equity may be filed against the party in whose favour the award is made, to set aside the award (e); provided the submission to the award has not been made a Rule of Court, in which case, according to the statute (9 and 10 Will. 3, c. 15,) application should be made to the Court which made the Rule, within the next term after the award made. If a reference be to a person to decide all matters in difference according to Law, and he means to decide according to Law and mistakes, the Court will set that right (f); but if a question of Law be expressly referred to an arbitrator, there, though the arbitrator is wrong in his conception of the law, the Award cannot be remedied (g): and though the law be not referred, if it be a doubtful point of law upon which the arbitrators have decided, and the Court on great deliberation should be of a different opinion, the Award will yet be good (h).

A defective Award as to Lands has been made good, and a

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| (u) Hankey v. Vernon, 2 Cox 12. | 1 Atk. 63; but see Ching v. Ching, 6 |
| (x) Blackhall v. Combs, 2 P. Wms. 69. | Ves. 282. Young and Walter, 9 Ves. 364. |
| (y) Kent and Bridgman, 2 Eq. Ab. 159. S. C. Prec. Ch. 293. | (c) Anon. MS. |
| (z) Villain v. Hyde, Ch. M. 1749, mentioned by Lord Mansfield in Foxcroft v. Devonshire, 2 Burr. 942. | (d) Ibid. |
| (a) As in the case of Foxcroft v. Devonshire, before cited. | (e) Anon. 3 Atk. 644. |
| (b) Ridout v. Payne, 3 Atk. 494, and S. C. 1 Ves. 11, 12. Cornesforth v. Geer, 2 Vern. 705. Metcalf and Ives, | (f) Young and Walter, 9 Ves. 365. |
| | (g) Ching v. Ching, 6 Ves. 228. Young and Walter, 9 Ves. 364. S. P. — v. Morgan, MS. and see 14 Ves. 271, in note; see, however, Kent v. Elstob, 3 East. 13, on this point. |
| | (h) 2 Atk. 494. |

party decreed to take a Fee, where by mistake, the word *Heirs* was omitted in the Award (i). The mistake, if not apparent on the face of the Award, may be made out by Evidence, and it must be made out to the satisfaction of the arbitrator; and the party must convince him that his judgment was influenced by that mistake, and that if it had not happened he should have made a different award (k).

*A *Mistake in Judgment* by an Arbitrator is not a good [*80 ground for relief, for then there would be no end of suits (l) (1).

It has been doubted whether after a general reference to arbitration, by parties in a suit, depending in the Court of Chancery, and made an order of a Court of Law, such order, by virtue of the statute (m), excludes the equitable jurisdiction over Awards in cases of Mistake (n); it has also been questioned, whether, if the submission is made a Rule of Court after a Bill is filed to set aside the Award, the Jurisdiction is ousted (o). If one condition of the submission is to be restrained from bringing a bill in Equity against the arbitrator, a plea of the Award, it seems, to a Bill filed against him would be allowed (p).

Mistakes in settled Accounts are elsewhere considered (q); but it may here be observed that if an account be settled, and a deed cancelled under a *mistake*, relief may be obtained (r).

Mistakes in Wills are frequently relieved against in Equity.

As where there was a mistake in the statement in the Will, and the mistake was clear and the intention plain, the Court rectified the mistake according to the intention (s). And where a man *recited in his will that he owed B. 400*l.* and charged [*81 his real estate with the payment of that sum, and in fact he owed 800*l.*; the recital in the Will was considered as a mistake, and

(i) Scott v. Wray, Rep. in Chan. 84.

(k) Knox v. Symmonds, 1 Ves. jun. 370.

(l) Anon. MS. and see Knox v. Symmonds, 1 Ves. jun. 370.

(m) 9 and 10 Wm. 3. c. 15.

(n) Nichols and Charlie, 14 Ves. 965; but see Browne and Browne, 1 Vern. 158.

(o) — v. Mills, 17 Ves. 419.

(p) See Lingood v. Croucher, 2 Atk. 396, 7; but see ib. p. 506.

(q) See tit. "Account," post.

(r) East India Company v. Neave, 5 Ves. 173.

(s) Williams v. Williams, 2 Bro. C. C. 87. Milner and Milner, 1 Ves. 106; see also Phillips and Chamberlain, 4 Ves. 51. Campbell v. French, 3 Ves. 321.

(1) So a mere mistake in the judgment of commissioners in making an assessment upon the occupants of lots in the city of New-York, to defray the expense of a common sewer, in pursuance of a legislative act, is not a ground of relief. *Le Roy v. The Mayor, Aldermen, and Commonalty of the City of New-York*, 4 Johns. Ch. Rep. 352.

And in the case of a levy of an execution on land previously mortgaged by the debtor, where the appraisers, by adopting an erroneous principle of law, made too high an estimate of the incumbrance, whereby too much of the land was set off to the creditor, it was held, that a court of chancery might grant relief, and that the proper relief was a reconveyance to the debtor of the excess of the land so taken. *Fitch v. Ayer*, 2 Conn. Rep. 143.

relievable (*t*). Where, however, a Testatrix bequeathed all her personal Estate to Trustees in trust, to sell, and pay all her debts, and in the next place to pay *A.* 300*l.* due on bond, and the Testatrix owed only 120*l.* to *A.* upon bond, the Court decreed payment of the whole 300*l.* (*u*). In all those cases where a mistake in a Will is relieved, it must appear *on the face of the Will*, otherwise no relief will be given. Where there is a complete and plain Will in writing, it cannot be altered or influenced by parol evidence as to the intention (*x*). Evidence as to the matter *dehors* the will, to show the mistake, is not sufficient (*y*). Even the instructions for the Will are inadmissible to show a mistake (*z*). The mistake must be clear and demonstrable; and wherever there is a clear mistake, or a clear omission, recourse is to be had to the general scope of the Will, and the general intention to be collected from it; but the first thing to be proved is, that there is a mistake (*a*). Where then the subject of a devise is described by reference to some extrinsic fact, extrinsic evidence is admissible to ascertain the fact; as where there is a devise of the estate purchased of *A.* or of the farm in the occupation of *B.* it may be shown by extrinsic evidence what estate it was that was purchased of *A.* or what farm it was in the *82] occupation of *B.* It is different *where there is a reference to some paper that is to make a part of the Will, for there it may be contended that the Will itself must specify the paper that is to be incorporated into it (*b*).

A Testator by his Will gave legacies to *A.* and *B.* describing them as grandchildren of *C.* and their residence in *America*, and by a Codicil he revoked these legacies, giving as a reason that the legatees were dead; but that *not being true*, it was held that the Will was not revoked, and that they were entitled to the Legacies upon proof of identity (*c*).

So where the residue of three-per-cent. Annuities was given to the *two* daughters of *A.*, and *A.* had *three* daughters; they all, on the ground of mistake, were decreed to take equal shares (*d*).

And where a specific sum was given as a residue, and *miscalculated*, the real residue was allowed to pass (*e*). So where there was a mistake in a will and Codicil, as to the amount of a fund, out of which younger children were to be provided for, it was rectified on the evident intent of the testator (*f*).

(*t*) *Goston v. Mills*, Prec. Ch. 9

(*u*) *Whitfield v. Clemment*, 1 Meriv.

402.

(*x*) *Nichols v. Osborne*, 2 P. Wms. 491.

(*y*) 9 Atk. 373.

(*z*) *Murray v. Jones*, 2 Ves. and Bea. 318.

(*a*) See *Ridout v. Dowding*, 1 Atk. 19. *Mellish and Mellish*, 4 Ves. 47.

(*b*) In *Sandford v. Raikes*, 1 Meriv. 653.

(*c*) *Campbell v. French*, 3 Ves. 321.

(*d*) *Stebbing v. Walkey*, 2 Bro. C. C. 85, and the cases mentioned in the argument of Mr. Scot, S. C. 1 Cox 250.

(*e*) *Danvers against Manning*, 9 Bro. C. C. 18. S. C. 1 Cox 203.

(*f*) *Brackenbury v. Brackenbury* 2 Eden. 275.

So where a testator gave a sum, *part of his four-per-cent. Bank Annuities*, to his wife for life, and after her decease to several relations; evidence was admitted to show that the testator had no such stock at the date of the Will, having previously sold it all, and invested the produce in *Long Annuities*, and how *the [*83 mistake arose; and upon such evidence the legacies were established (g). If the testator had had the stock at the time, the legacy would have been considered as *specific*, and that he meant that identical stock; and any act of his destroying that subject would be a proof of *animus revocandi*; but if it is a *denomination*, not the identical *corpus*, in that case, if the thing itself cannot be found, and there is a mistake as to the subject out of which it is to arise, that will be rectified (h).

If a *Ring* or a *Picture* be given, and neither can be found, the mistake cannot be rectified (i).

A *Mistake* in the name of a Legatee may be corrected in favour of the Legatee by articles of description; sufficiently pointing out the person intended to take (k), and this, though both the Christian and Surname be mistaken (l). So in the case of a legacy, parol evidence is admissible to explain a nick-name (m), or where there are two persons of the same name (n), but not to fill up a blank in a Will (o), unless it be only as to a Christian name (p). In cases where evidence *is admitted and ope- [*84 rates, it must be conclusive, to have effect; if it affords only a high degree of probability (q) it is insufficient. A wrong description of a Legatee will not defeat a Legacy given to him by name (r); but where a Legacy was given "to *James*, son of *Thomas A.*" and there was no person of that description; but there was a "*Thomas*, son of *James A.*" The Court would not permit evidence to show that this was a mistake in the description (s). Where a Legacy was given to the testator's nephew, *Robert* the son of *Joseph C.* and the testator had two nephews called *Robert*, one the son of his brother *John C.* and the other of his brother *Thomas C.* and the testator had no brother *Joseph*, nor was there any other *Joseph C.* parol evidence was allowed to explain who was meant (t).

(g) *Selwood v. Mildmay*, 3 Ves. 306. See a similar case, *Door v. Geary*, 1 Ves. 255; and see *Garvey v. Hilbert*, 19 Ves. 125, and the cases there cited.

(h) *Selwood v. Mildmay*, 3 Ves. 310.

(i) *Ibid.*

(k) *Rivers' case*, 1 Atk. 410. see *Parsons v. Parsons*, 1 Ves. Jun. 266. S. C. noticed arg. 3 Bro. C. C. 447.

(l) *Beaumont v. Fell*, 2 P. Wms. 140. *Goodinge v. Goodinge*, 1 Ves. Sen. 231, 61. *Dowsett v. Sweet*, Amb. 175. *Hampshire v. Pierce*, 2 Ves. 217.

(m) See dict. in *Andrews v. Dobson*, 1 Cox 226; and see *Baylis v. Attorney-General*, 2 Atk. 239. *Edge v. Lord*

Salisbury, Amb. 71.

(n) See *Lord Cheney's case*, 5 Co. 68. *Castledon v. Turner*, 3 Atk. 258. *Goodinge v. Goodinge*, 1 Ves. 232.

(o) *Baylis v. Attorney-Gen.* 2 Atk. 239. *Hunt v. Hort*, 3 Bro. C. C. 311. *Castledon v. Turner*, 3 Atk. 258.

(p) *Price v. Page*, 4 Ves. 680.

(q) See *Holmes v. Custance*, 12 Ves. 279. *Del Mare against Rebello*, 3 Bro. C. C. 446, and S. C. 1 Ves. Jun. 412.

(r) *Standen v. Standen*, 2 Ves. 589.

(s) *Andrews v. Dobson*, 1 Cox 225.

(t) *Careless v. Careless*, 1 Meriv. 384.

Where the words used in the gift of a Legacy are plain, evidence as to the intention, and to show there was a mistake as to the fund, is inadmissible (*u*). Some such evidence was reluctantly admitted in one case (*x*) ; but there, it seems, the peculiarity of the will furnished sufficient doubt to warrant the admission of collateral evidence to explain it (*y*).

Where a Will is cancelled by mistake, or on a presumption that a latter Will is good, which proves void, this will not let in the heir, but is relieved against in Equity (*z*)

*85]

*CHAP. II.

ACCOUNT.

THE Jurisdiction of Courts of Equity in matters of Account has been sometimes supposed to have arisen, on the ground, that the accounting party was considered in the light of a trustee (*a*). It seems, however, that the principle upon which courts of Equity originally entertained suits for an account where the party had a legal title, was, that though he might support a suit at Law, a court of Law could not give *so complete a remedy* as a court of Equity (1) ; and, by degrees, Courts of Equity assumed a concurrent jurisdiction in cases of Account (2). The same species of relief is given at Law in the action of Account, as under a bill in Equity ; but the great advantage of the latter, and the difficulty and delay where the account comes before *auditors*, has brought that action into disuse (*b*). So established is the Jurisdiction of Courts of Equity, that after a Decree to account, a party is not allowed to bring an action at

(*u*) Chambers v. Minchin, 4 Ves. 676.

(*x*) Fonnereau v. Poyntz, 1 Bro. C. C. 472.

(*y*) Ibid. 1 Bro. C. C. 480.

(*z*) Onions v. Tyrer, 1 P. Wms. 345, 6 ; & 2 Vern. 742, recognised in Perrott v. Perrott, 14 East 440, in which case a cancelled appointment by Deed was relieved against on the ground of mistake.

(*a*) See 4 Vin. Abr. 533, and what

Lord Erskine says, 13 Ves. 268 ; but see 1 Ves. Jun. 420.

(*b*) The Corporation of Carlisle v. Wilson, 13 Ves. 278, 279. Ex parte Bax, 2 Ves. 388 ; and see 11 Ves. 155. O'Connor v. Spaight, 1 Sch. & Lefr. 309, and 2 Ves. 388. 1 Selwyn's Nisi Prius, p. 1. Mitford's Pleadings, p. 110. The most recent case of an action of account is reported in 3 Wills. 73.

(1) Vide Ludlow v. Simond, 2 Caines' Cas. in Error, 39, 53. Rathbone v. Warren, 10 Johns. Rep. 537. 595. 596.

(2) Vide Ludlow v. Simond, 2 Caines' Cas. in Error, 1, 38. 52. Post v. Kimberly, 9 Johns. Rep. 470. 493. Duncan v. Lyon, 3 Johns. Ch. Rep. 351. 360, 361. In the last case cited, the chancellor said, "I have not been able to discern any good reason why that action" (account) "has so totally fallen into disuse."

the Defendant need not appear, but apply to Equity for an attachment (c).

If an Account is sought by a Bill, and a balance is reported due to the Defendant, he is entitled to the benefit of it; and when the Report is confirmed, may enforce the execution of the Decree; for it is implied, if not expressed in the Decree to account, that the balance shall be paid to the party entitled (d).

If the right at Law be doubtful, an issue is directed, and if the right be established, the account follows (e); and, in general, where the party cannot recover at Law, a bill for an Account is not sustainable. (f).

Dealings between a *tradesman* and *customer* may be the subject of *Account* in Equity, especially in the case of securities obtained from an extravagant young man on misrepresentation (g).

It is not, however, every case where the defendant owes more to the plaintiff that forms a ground for a bill for an Account (1). There must be *mutual demands* (h); a series of accounts on one hand, and a series of payments on the other, and not merely one payment and one receipt (i): and if the subject is matter of set-off at law, and capable of proof, a bill will not lie (k) (2). The case of *Dower* is always *considered as standing upon [*87 its own specialities; and so is the case of a *Steward* (l).

Where there have been various dealings between *Landlord* and *Tenant*, so as to produce an Account too complicated to be taken at law, and the Landlord brings an ejectment for non-payment of rent, the Tenant may file a bill before judgment at law, for an account, on the footing of those dealings, and to have the balance applied to the rent claimed to be due, and the tenant need not bring in the rent under the statute 4 Geo. 1. c. 28 (m).

If the Tenant's counter-demand amount to a legal set-off, he cannot have relief in Equity; and it was thought doubtful whether Equity would relieve in case of an equitable set-off (n).

(c) *Bell v. O'Reilly*, 2 Scho. & Lef. 430.

(d) *Bodkin v. Clancey*, 1 Ball & Beaty, 217.

(e) *Vid. Milbourn and Fisher*, 5 Ves. 685, in note.

(f) 13 Ves. 278. See post, 75.

(g) *Lord Courtney v. Godschall*, 9 Ves. 473. S. C. MS.

(h) *Dinwiddie v. Bailey*, 6 Ves. 136.

(i) *Wellings and Cooper in Exchequer*, cited by Romilly, MS; and see 9 Ves. 473.

(k) *Dinwiddie v. Bailey*, 6 Ves. 136.

(l) 6 Ves. 136.

(m) *O'Connor v. Spaight*, 1 Sch. & Lefr. 305, &c.

(n) *Townrow v. Benson*, 3 Madd. Rep. 203.

(1) The plaintiff may come into chancery to have his account allowed, as well as to compel the defendant to account; for "in bills to account, both parties are considered as actors, or plaintiffs." *Ludlow v. Simond*, 2 Calnes' Cas. in Error, 1, 30. 52, 53.

(2) *Vide Porter v. Spencer*, 2 Johns. Ch. Rep. 169. 171.

The court gives an account in the case of *Mines* (o), because it is in the nature of a *Trade* (p); and in the case of *Timber* cut down (q), to prevent a multiplicity of suits (r); though as to this, if there is not a ground for an injunction to restrain waste, as where more timber is threatened to be cut, the party must go to Law (s). Lord Thurlow, indeed, appears to have thought, that where a Tenant for life, punishable for waste, fells timber, a Bill for an Account by a Remainder-man in fee lies against him, on the ground that the Tenant for life has made himself *88] Bailiff to the plaintiff (t); though that does not seem *very consistent with the doctrine in the same case, viz. that the remainder-man must take the money the *timber produced*, and not the *real value* of the timber, which even a Court of Law would have given him (u).

A *factor*, unless he be an infant (x), is compellable to account in Equity, and likewise for a deceased co-factor (y); and the representatives of a factor are accountable (z); and no salary will be allowed to a factor or agent when he acts against the interest of his principal (a).

In two early cases (b), it was held, that where a factor had omitted at his peril to pay duties to a *foreign King* abroad, the Principal could not insist upon payment of what he had so saved by not paying the duty; "he that hath possession having right against all but him that hath the very right;" but where the duties had not been paid at home, the Factor was held accountable to the Principal (c).

A *conuzor* has a right to file a bill for an Account against a conuzee, to see if the conuzee upon the extended value under an *elegit*, has received a satisfaction for his whole debt (d); but in these cases, it has been said, the Tenant by *elegit* is never made to pay costs (e); and the conuzor will not, it seems, be relieved without paying the conuzee all that is due to him, for principal, interest, and costs, though they *exceed the penalty (f); according to the old maxim of Equity, *He that will have Equity done to him, must do it to the same Person*. The arrears of a *Rent-Charge* may, it seems, be recovered in Equity (g)(1).

(o) Bishop of Winchester v. Knight, 1 P. Wms. 406.

(p) Story v. Lord Windsor, 2 Atk. 630.

(q) 1 P. Wms. 406.

(r) Pulteney v. Warren, 6 Ves. 89.

(s) 1 P. Wms. 406. *Jesus Coll. v. Bloom*, 3 Atk. 262.

(t) Lee v. Alston, 1 Ves. Jun. 82. S. C. 1 Bro. C. C. 196.

(u) Lee against Alston, 3 Bro. C. C. 38.

(x) Smalley v. Smalley, 1 Eq. Ab. 6.

(y) Holtcomb v. Rivers, 1 Ch. Ca. 127. S. C. 1 Eq. Abr. 5.

(z) Nels. 125. S. C. 1 Eq. Abr. 6.

(a) Maxwell v. Sharp, Dom Proc. 10 May 1721.

(b) Smith v. Oxenden, 1 Cha. Cas. 25; and Knipe v. Jesson, Ib. p. 76.

(c) Borr v. Vandal, Ib. p. 30.

(d) Yates v. Hambly, 2 Atk. 362.

(e) Owen against Griffith, Ambl. 520.

(f) Hale v. Thomas, 1 Vern. 349; and see Godbery v. Watson, 3 Atk. 517.

(g) Foster v. Foster, 1 Vern. 386; but see Champemoon v. Gubbs. Ib. 382.

(1) A bill in chancery for an account of rent in arrear, may be sustained, where

An heir cannot, *merely as heir*, file a Bill for an Account, unless he states an impediment to his recovering at Law: as, that the defendant has the *title deeds* necessary to maintain his title, or that *terms* are in the way of his recovery at Law; or some other legal impediments, which do, or may probably, prevent it (h); Bills of this description are what are termed *Ejectment Bills*, or an *Equitable Ejectment*; and as in these cases, where the validity of a Will comes in question, it cannot be determined by a Court of Equity; it sends that to be determined by the proper tribunal, by *directing the heir to bring an Ejectment*, providing, at the same time, that the defendant shall not set up at Law a term satisfied or unsatisfied (i); and those obstacles being removed, and a trial had in that way under the control of a Court of Law, they come back for the *account*, the *deeds*, &c. which course leaves all the encumbrances, just as much encumbrances as if the possession had not been changed. There is great convenience in giving relief in that shape rather than by directing *issues* (k), the granting of which is discretionary in the Court (l), for the question whether a new trial ^{*}should or should not be had, is discussed with much [*90 more satisfaction, where the trial was had, than in the Court out of which the issue was directed. In bills, however, of this description, there must, it seems, be some *averment* upon the Record, as well as *proof*, that those obstacles do exist which may prevent an ejectment; the admission of such obstacles by infant defendants is insufficient (m). To an ejectment Bill, stating outstanding Leases, and praying relief, a Plea that there were no such outstanding Leases, has been held good (n).

With respect to the *Account* ordered of *Rents and Profits* of Estates, in these and similar cases the rule appears to be, that where a man brings his Bill in Equity, in respect of a *trust*, and upon a mere equitable title, he will in Equity recover the Estate; but as upon a legal title no more than six years mesne profits are recoverable at Law, so where an Estate in trust is recovered in Equity, the Account of Rents and Profits is not extended beyond six years (o); and under special circumstances

(h) *Pulteney v. Warren*, 6 Ves. 89; and see *Dormer v. Fortescue*, 2 Atk. 284. *Hopkins v. Bond*, 1 Sch. & Lefr. 431; and see *Pemberton v. Pemberton*, 13 Ves. 297. *Crow v. Tyrell*, 3 Madd. Rep. 179.

(i) See *Leighton v. Leighton*, 1 P. Wms. 671.

(k) As was done in *Pemberton* and *Pemberton*, 13 Ves. 290.

(l) *Pike v. Hoare*, 2 Eden, 183.

(m) *Pemberton v. Pemberton*, 13

Ves. 298; and see *Jones v. Jones*, 3 Meriv. 173; and *Barber and Hunter*, mentioned in that case, p. 170 and 173.

(n) *Armitage v. Wadsworth*, 1 Madd. Rep. 139, et vide *Jones v. Jones*, 3 Meriv. 173.

(o) See *Reade v. Reade*, 5 Ves. 749, 750. *Stackhouse v. Barnston*, 10 Ves. 469; but see what is said in *Dormer v. Fortescue*, 3 Atk. 130.

the remedy is difficult or doubtful at law, or where the title is perplexed or uncertain, or where there is uncertainty as to the tenant's responsibility. *Livingston v. Livingston*, 4 Johns. Ch. Rep. 287.

the Court will only decree an Account of Rents and Profits from the time of filing the Bill; as where defendant had no notice of the plaintiff's title, nor had the deeds and writings in his custody, in which the plaintiff's title appeared; or where the title of the plaintiff appeared by deeds in a stranger's custody. So, where there hath been any default or laches in the *91] plaintiff in not *asserting his title sooner (p), and he has lain by, the Court has often thought fit to restrain it to the filing of the Bill. In the case of a Bill brought by an infant to have possession of an estate, and an Account of Rents and Profits, the Court will decree an Account *from the time the infant's title accrued*; for every person who enters on the estate of an infant is considered as entering as guardian or bailiff for the infant (q). Where, indeed, there is a verdict against the infant's title, he can have no Account till he has recovered at Law, and the Bill will be retained, and a trial in Ejectment directed (r). There are other cases where the Court will, merely upon a legal title, give the account from the filing of the Bill; as, wherever the plaintiff has been kept out of the Estate by the *fraud, misrepresentation, or concealment* of the defendant (s).

If there is no trust nor infant (t) in the case, nor any entry made by him who is entitled to the mesne profits, Equity will not decree an account of rents and profits until a recovery has been had at Law (u). But where a discovery is necessary of the deed under which the plaintiff's title arises, and relief is prayed to have it produced at all trials at Law, and to have attested copies, an account of profits will be decreed, without *92] *having the title first established at Law, if there is no doubt as to the title (x).

Where a person has been ejected at Law, and the other party has been *in possession above twenty years*, and no account demanded, or bill filed in that time, the *Statute of Limitations* (y) will bar an account in Equity, as well as an action for the mesne profits at Law; but this statute does not extend to a trust (z).

In all cases where questions have arisen about *Shares in Water-works*, the parties have constantly resorted to Equity for mesne profits, though it is a legal Estate, and a corporeal inheritance (a).

Under the head of Account, it is, that *Partnership Dealings*

(p) See *Lockey v. Lockey*, Prec. Ch. 518.

(q) *Dormer v. Fortescue*, 3 Atk. 130; see *Yallop and Holworthy*, 1 Eq. Abr. 7. *Newburgh v. Bickerstaffe*, 1 Vern. 298, and see *Pettward v. Prescott*, 7 Ves. 541.

(r) *Newburgh v. Bickerstaffe*, 1 Vern. 295.

(s) 3 Atk. 130; and *Bennet v. Whitehead*, 2 P. Wms. 645, where

the deeds and writings making the plaintiff's title were concealed by defendant. *Townshend v. Ash*, 3 Atk. 340.

(t) *Roberdan v. Rous*, 1 Atk. 544.

(u) *Norton v. Frecker*, 1 Atk. 525.

(x) *Townshend v. Ash*, 3 Atk. 337.

(y) 21 Jac. I.

(z) *Nevarre and Rutton*, Vin. Abr.

Tit. "Account," D. A. pl. 7.

(a) 3 Atk. 337.

form a subject of Equitable cognizance (*b*). If there be no admitted balance, a Court of Law cannot give relief (*c*). But to have relief in Equity, the Partnership must not be illegal, as in *Underwriting*, for in such case a Bill for an Account will not lie (*d*).

According to the report of *Forman v. Homfray* (*e*), it has been said, there is no instance of a Partner being allowed to pray for an Account merely, and not for a Dissolution of the Partnership, for otherwise, a Partner might file a Bill annually for an account, and that a bill, to be sustainable, must show the Partnership is dissolved or pray that it *may* be. But in a recent case *that doctrine was denied; and it was observed, [*93 that a Bill for an Account was the only relief a partner had; and that what was said in *Forman v. Homfray* only applied to the case of an injunction (*f*).

It has been holden, that a Court of Equity has Jurisdiction against a *Corporation* on a Bill for an Account of Profits, in the nature of a Partnership; and this, not only at the instance of a member, but of a stranger (*g*).

A *Society* for relief in sickness, &c. by means of a fund raised by Subscription of the Members, has been considered as a *Partnership*, it having no corporate character (*h*); and where it has been found that the Society has existed upon principles, which, with reference to the amount of the number of Subscribers and the nature of the Subscriptions, made the whole a bubble, the same has been dissolved, each member receiving a proportion of the sums subscribed (*i*).

Partners are joint-tenants in the stock, and all effects; and not only in that particular stock in being at the time of entering into the Partnership, but they continue so throughout, whatever changes may be made in the course of trade (*k*)(1); but Part

(*b*) 3 Black. Comm. 437.

(*c*) See what Lawrence, Just. says, in *King v. Whitstable Company*, 7 East, p. 353, and approved by Lord Eldon, 17 Ves. 326. See also *Chapman and Koops*, 3 Bos. and Pul. 289. and *Watson's Partnership* 107.

(*d*) *Knowles v. Haughton*, 11 Ves. 168. S. C. MS. overruling *Mills v. Brookes*, 3 Ves. 612; and see *Otley v. Brown*, 1 Ball & Beatty, 360. *Joy v. Campbell*, 1 Sch. & Lefr. 328.

(*e*) 3 Ves. & Bea. 330.

(*f*) *Harrison v. Armitage*, 4 Madd.

Rep. 143; and see *Knowles v. Haughton*, 11 Ves. 168.

(*g*) 17 Ves. 315; and see further as to this case, 1 Meriv. 107. See also *Attorney General v. Governors of Foundling Hospital*, 2 Ves. Jun. 42.

(*h*) *Beaumont v. Meredith*, 3 Ves. & Bea. 130.

(*i*) *Buckley v. Cater*, stated 17 Ves. 15. *Pearce v. Piper*, 17 Ves. 1; and see *Beaumont v. Meredith*, 3 Ves. & Bea. 130.

(*k*) 1 Ves. 242, 3; and see *Lyster v. Dolland*, 1 Ves. Jun. 435.

(1) And where *A.* and *B.* were partners, who carried on trade with the funds of *A.* in the name of *B.*, and *B.* without a dissolution of the partnership, or rendering any account, without the consent of *A.*, formed a partnership with *C.*, and appropriated all the funds of the former partnership to the business of the new concern; and on the death of *B.*, *A.* filed his bill against the administrators of *B.* and *C.*, his surviving partner, for a discovery and an account; it was held,

Owners of a *Ship* are considered only as tenants in common, and not joint-tenants (*l*).

*94] *If a person become by his acts a Partner—in a Colliery for instance—in which land is necessary to carry on a trade, the interest in a *lease* will pass as an incident to the trade, by operation of Law, and is not affected by the *Statute of Frauds* (*m*). Being thus seised *per my et per tout*, where an account is to be taken, each is entitled to be allowed against the other every thing he has advanced or brought in as a partnership transaction, and to charge the other in that Account with what he has not brought in, or has taken out more than he ought; and nothing is to be considered as his share but his proportion of the residue in the balance of the Account (*n*).

A Judgment and Execution against one partner for his separate debt, does not put the other in a worse condition; for he must have all the allowances made him before the Judgment Creditor can have the share of the other applied to him.

So, if one partner dies, the debts and effects survive; but the survivor, unless it is expressly provided otherwise (*o*), is considered in Equity, (except as to the *good-will* of the trade, which survives, and is not partnership stock (*p*),) barely as a trustee for the representative of the deceased, upon which footing the Account would be taken, and nothing considered as the share of the survivor till afterwards (*q*); which is from *95] the continuance of the property in the stock to *the representative of the deceased partner, who has a specific lien thereon, although the survivor afterwards dies, or becomes bankrupt. If the surviving partner carries on the trade with the capital with which the Testator carried it on, the profits will belong to those entitled to the personal estate, in proportion to their shares (*r*). So, if the partnership is dissolved by consent, or by effluxion of time (*s*), that determines not the legal interest,

(*l*) *Ex parte Young*, 2 Ves. & Bea. 242.

(*m*) *Forster v. Hale*, 3 Ves. 696. 5 Ves. 308.

(*n*) *West v. Skip*, 1 Ves. 242, 3.

(*o*) *Peace v. Chamberlaine*, 1 Ves. 33.

(*p*) *Hammond v. Douglas*, 5 Ves. 539. *Farr v. Pearce*, 3 Madd. Rep. 74. *Sed vid. Crawshay v. Collins*, 15 Ves. 227.

(*q*) 1 Ves. 243; and see as to this *Croft v. Pyke*, 3 P. Wms. 182, and — *ex parte Williams*, 11 Ves. 5; and *ex parte Ruffin*, 6 Ves. 126, 7. *Annand v. Honiwood*, 2 Chan. Cas. 129.

(*r*) *Hill v. Burnham*, cited Arg. 15 Ves. 220. *Brown v. Vidler*, cited *Ib.* 223. *Coxwell v. Bromet*, cited *Ib.*

(*s*) 1 Ves. 243.; and see *ex parte Smith*, 6 Ves. 297.

that the plaintiff was entitled to an account from C. of the profits of the new partnership, and of the personal estate of the intestate, in his hands. *Long v. Majestre*, 1 Johns. Ch. Rep. 305. Joint owners or partners are not entitled to charge each other for extra services in the management of the partnership concerns, without an express agreement for that purpose. *Franklin v. Robinson*, 1 Johns. Ch. Rep. 157. *Bradford v. Kimberly*, 3 Johns. Ch. Rep. 431.

which continues as before; nor is the property in the stock of the partner so going out divested thereby; but he remains equally entitled as Joint-tenant with the other: and in a Bill for an Account, the stock would be subjected for his satisfaction. As between one partner and the separate creditors of the other, the separate creditors cannot affect the stock any further than that partner could whose creditors they are (t); and if they proceed against the partnership property, the partners may file a Bill to be quieted in the possession of the partnership effects, and pray for an Account of what is due to the partner so giving a security, and for an injunction in the meantime (u).

Upon an Extent against the Partner, the Crown can only take the separate interest of the Partner, and that, liable to the partnership debts (x).

Courts of Law have followed Courts of Equity in giving execution against Partnership Effects, but do *not appear to [*96 adhere to the principle; when they suppose that the interest can be sold before it has been ascertained what is the subject of sale and purchase. According to the old law before Lord Mansfield's time, the Sheriff, under an execution against Partnership effects, took the undivided share of the debtor, without reference to the Partnership Account; but a Court of Equity would have set that right, by taking an Account, and ascertaining what the Sheriff ought to have sold. The Courts of Law, however, have repeatedly laid down (y), that they will sell the actual interest of the Partner, professing to execute the equities between the Parties, but forgetting that a Court of Equity ascertained previously what was to be sold. How could a Court of Law ascertain previously what was the interest to be sold, and what the equities, depending upon an Account of the Partners for years (z)?

Where there has been a fair dissolution of Partnership between two; and one, by agreement, retains the Partnership effects, and afterwards becomes a bankrupt, the joint creditors have no right as against what was joint property, remaining in *specie* (a); for by the agreement, the *joint* becomes *separate* Estate, if *possession* of the joint property was given to the one Partner according to the nature of the contract (b).

(t) West and Skip, 1 Ves. 243; 650.; and see Scott v. Scholey, 3 and see Young v. Keighley, 15 Ves. East, 468.
557.

(u) Taylor v. Fields, 15 Ves. 559, in note, and 4 Ves. Jun. 396. S. C. MS. and see Barker v. Goodair, 11 Ves. 85.

(x) King v. Saunderson, 1 Wight 50.

(y) Barkhurst v. Clinkard, 1 Shaw 173. Eddie v. Davidson, Dougl.

(z) Per Eldon. See Waters v. Taylor, 2 Ves. & Bea. 301.

(a) Ex parte Ruffin, 6 Ves. 119. Ex parte Williams, 11 Ves. 3.; and see ex parte Fell, 10 Ves. 347. Anon. 11 January 1807, MS. and see 1 vol. Rose, 416.

(b) Ex parte Harris, 2 Madd. Rep. 589.

A partnership, without any agreement for continuance, may *97] be dissolved at any time when either party *thinks proper, subject to the proper Accounts (c) ; but all the subsisting engagements must be wound up: and for that purpose they remain with a joint interest; but they cannot enter into new engagements. If after such dissolution the trade be carried on by any of the partners, such partners are liable to account for the profits produced by such trading (d).

Where a partnership is so dissolved, a Bill may be filed for an Account, and to restrain the defendant from executing securities in the name of the Firm (e).

The Lunacy of a Partner, who had contracted to be actively engaged in the partnership, may, perhaps, warrant the dissolution of a partnership, especially if it be pronounced incurable (f). And if the conduct of Partners has been such as to make it impossible to carry on the partnership, upon the terms upon which it was entered into, the same will be dissolved (g), although one Partner objects to the dissolution (h).

A partnership for a term of years is dissolved by the death of a Partner before the term has expired (i).

On a bill filed for an account of partnership transactions, the defendant, it has been held, may by answer deny that he is a partner, and refuse to set forth an account (k) ; but the Court in such case will direct an issue, whether a partnership exists or *98] not ; and if *the result of the issue is, that he is not a partner, the bill is then dismissed (l). If a part owner of a ship does not contribute his share of the expense in setting out the Ship, he is not entitled to an account of the profits of that voyage (m). (1)

In a case where there was a Lease of a Coal Mine to A. reserving Rent ; and A. declared himself a Trustee for five per-

(c) *Peacock v. Peacock*, 16 Ves. 50. Rep. 251.
57.

(d) *Featherstonhaugh v. Fenwick*, 17 Ves. 310 ; and see *Crawshay v. Collins*, 15 Ves. 218.

(e) *Master v. Kirton*, 3 Ves. 75.

(f) See *Waters v. Taylor*, 2 Ves. & Bea. 303. and *Sayer v. Bennett*, 1 Cox 107.

(g) 2 Ves. & Bea. 299.

(h) *Baring v. Dix*, 1 Cox 213.

(i) *Gillespie v. Hamilton*, 3 Madd.

(k) *Marquis of Donegal v. Stewart* 3 Ves. 446. Sed qu. whether, according to more recent decision, the party ought not to plead in such case. See post, title, "Answer."

(l) See *Peacock v. Peacock*, 15 Ves. 52; and see *Binford v. Dommett*, 4 Ves. 756.

(m) See 2 Vol. Life of Sir Leal. Jenkins, p. 792.

(1) If one partner withdraws and uses the partnership funds in his own private trade and speculations, he must account for the interest on the moneys so withdrawn, and also for the profits of the trade. *Stoughton v. Lynch*, 1 Johns. Ch. Rep. 467. But unless he uses the money in trade so as to make a profit, he is chargeable with simple interest merely, otherwise, with compound interest. *Stoughton v. Lynch*, 2 Johns. Ch. Rep. 209.

sons, to each a fifth; and the five partners entered upon, worked, and took the profits of the Mine, which afterwards became unprofitable, and the Lessee insolvent; it was, on an appeal, held, that the *cestuis que Trust* were liable to the payment of the Rent (n).

The Statute of Limitations is no plea in bar to an open Account (o); but though length of time forms no bar to an Account, as *between merchant and merchant*, yet if dealings between them have *ceased for several years*, and one of them dies, and the surviving merchant brings a Bill for an Account, the Court will not decree the same, but leave the plaintiff to his remedy at Law (p). If all accounts have ceased above six years the Statute of Limitations is, it seems, a bar (q). The difference between merchants' Accounts, and others, has been said to be, that as to the former, *a continuation of Accounts afterwards will [*99 prevent the Statute running against the previous Accounts, but as to others will be a bar as to all before six years (r); but it seems, a new item in any Account within six years, takes the whole Account out of the Statute (s).

Length of time cannot be set up by *demurrer*, as a *complete bar* to an *equitable demand*; for length of time operates as a bar, not *proprio jure*, but as a fact showing acquiescence; and a party cannot avail himself of an inference from facts on a demurrer (t); but *length of time* may be urged with great effect at the *hearing* of the cause; for it is a rule founded on principles of *public policy* (u), that parties shall not by neglecting to bring forward their demands, subject others to insuperable difficulties; every presumption, therefore, that can fairly be made, will be made against a stale demand. Indeed, the very forbearance to make a demand is considered as affording a presumption, either that the claimant is conscious it was satisfied, or intended to relinquish it (x). "A Court of Equity," says *Lord Camden*, "which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has

(n) *Clavering v. Westley*, 3 P. Wms. 403. Note (g.)

(o) *Scudamore v. White*, 1 Vern. 456.

(p) *Sherman v. Sherman*, 2 Vern. 276; and see *Bridges v. Mitchell*, Gilb. Eq. Rep. 235.

(q) *Barber v. Barber*, 18 Ves. 286; and see *Crawford v. Lyddel*, cited 6 Ves. 382. See also what Lord Kenyon says in *Catling v. Skoulding*, 6 T. R. 193. See also the subject considered in *Jones v. Pengree*, 6 Ves. 580; and in *Duff v. East India Company*, 15 Ves. 198; and in Serj. William's note to *Webber v. Tivil*, 2 Saund. 121.

(r) *Martin v. Heathcote*, Feb. 8th, 1783, MS.

(s) 6 T. R. 189.

(t) *Doleraine against Browne*, 3 Bro. C. C. 633. In *Havendon v. Lord Annesley*, 2 Sch. & Lefr. 637, 8, Lord Redesdale quarrels with this decision; but in the last edition of his *Treatise on Pleadings*, 173, 4, (3d edit.) he seems to concur.

(u) See *Hercy against Dinwoody*, 4 Bro. 268.

(x) *Pickering v. Lord Stamford*, 2 Ves. jun. 280. 582, 3. And see *Doleraine v. Browne*, 3 Bro. Ch. C. p. 633, and *Higgins v. Crawford*, 2 Ves. jun. 572. *Brownwell v. Brownwell*, 2 Bro. C. C. 63; and see *Sturt v. Mellish*, 2 Atk. 610.

slept upon his right, and acquiesced for a great length of time. *100] Nothing can *call forth this Court into activity but *conscience, good faith, and reasonable diligence*: where these are wanting, the Court is passive and does nothing. Laches and neglect are always discouraged; and therefore, from the beginning of this jurisdiction there was always a limitation to suits in this Court (y)."

Where, therefore, a party has lain by for a great length of time, and suffered an estate to be distributed, he cannot insist on an Account (z); but on the other hand there are cases when, where parties are not called upon to refund what has been applied, and the Accounts are clear, relief has been given, notwithstanding great length of time has elapsed (a). In one case, an Account was directed after thirty years acquiescence (b). (1)

A *release*, if under seal, may be pleaded in bar to a Bill for an Account (c); and so may a *stated Account* in writing (d); or it may be insisted on by answer (e). But a *Receipt in full* has not been admitted as conclusive in answer to a Bill for an Account against a *Steward*, where suspicious circumstances appeared on *101] the face of the answer (f). *A Release, not under seal, must be pleaded as a stated Account (g). If the Bill not only impeaches an Account, but Charges, the plaintiff has no counterpart, and the defendant pleads a stated Account, he must

(y) *Smith v. Clay*, Amb. 645; but see judgment more fully reported, 3 Bro. C. C. 638, in note, taken from Lord Camden's note book, 2 Sch. & Lefr. 631; and see *Lacon v. Briggs*, 3 Atk. 105. *Hovendon v. Lord Annesley*, 2 Sch. & Lefr. 630. *Rigby v. Macnamara*, MS.

(z) *Hercy against Dinwoody*, 4 Bro. 257; and see *Smith v. Clay*, 3 Bro. C. C. p. 539, in n. S. C. Amb. 645, but not so full. See also *Doleraine v. Browne*, 3 Bro. C. C. 646. *Baskerville v. Brain*, 24th Feb. 1804, MS.

(a) As in *Pickering v. Lord Stamford*,

2 Ves. 581. See *Astrey's case*, 2 Freem. 55.

(b) *Lord Kingsland v. Lady Tyrconnel*, 17 Feb. 1734. Dom. Proc. Lord Harcourt's MS. Tables.

(c) *Mitford's Pleadings*, 209, 210.

(d) *Ibid.* 208. 2 Atk. 399. 3 Bro. C. C. 170.

(e) *Sumner v. Thorpe*, 2 Atk. 1. *Burke v. Brown*, 2 Atk. 399.

(f) *Middleditch v. Sharland*, 5 Ves. 87.

(g) *Gilb. Ch.* 57, cited, *Redesdale Tr.* Pl. 213; 3d Edit. Anon. 3 Atk. 70.

(1) A court of chancery will not willingly decree an account, when the transactions have become obscure and perplexed by length of time; especially after the death of the original parties, and when the loss of evidences and papers may reasonably be presumed. There is, however, no definite rule on this subject; and each case must depend upon the exercise of a sound discretion arising out of the circumstances. Thus, where on a bill filed by the administrator of an executor, for an account, it was shown, that he had fully administered, and distributed a small surplus, and that *twelve years* had elapsed, the court refused an order of reference for an account. *Rayner v. Pearsall*, 3 Johns. Ch. Rep. 578. So, where a bill for an account was filed against executors, in 1809, as to transactions before, and at the commencement of the *American* war, it was dismissed on the ground of the staleness of the demand; 26 years having elapsed from the termination of the war to the filing of the bill. *Ellison v. Moffat*, 1 Johns. Ch. Rep. 46. So, where an agent suffered 30 years, after his agency had ceased, and 16 years before the death of his principal, to elapse without rendering any account, or filing a bill, it was held, that his demand was barred. *Moors v. White*, 6 Johns. Ch. Rep. 360.

annex it to his answer (*h*). If error or fraud is charged, it must be denied by the plea as well as by way of answer; and if neither error or fraud is charged, the defendant must by his plea aver, that the stated Account is just and true, to the best of his knowledge and belief (*i*).

Every Release must be founded on some consideration, otherwise Fraud will be presumed (*k*). The consideration of a Release must be either a valuable consideration then given, or the adjustment of depending accounts. In the latter case, the fairness of the accounts is of the essence of the consideration; and if they are not fair, the instrument founded on such a consideration is in itself void, and therefore operates nothing (*l*).

A stated Account, to be good, and pleadable as such, need not be signed by the party; for it is not the signing, but the person to whom the Account is sent keeping it by him any length of time without making any objection, which binds him, and prevents his entering into an open Account afterwards (*m*). It is said, that among merchants it is looked upon as an allowance of an Account current, if the merchant who *receives it [*102 does not object against it in a second or a third post (*n*).

And with respect to *foreign Merchants*, if one Merchant sends an Account current to another in a different country, on which a balance is made due to himself, and the other keeps it by him two years without objection, the rule in Equity, and of Merchants, is, that it is considered as a *stated* Account (*o*). (1)

It is a Rule, that a stated Account shall not be unravelled, and that such Accounts carry Interest (*p*); (2) but where a *Fraud* appears in a stated Account, the whole will be opened, though of a great many years standing (*q*). (3) And though an Account be

(*h*) *Hankey v. Simpson*, 3 Atk. 303.

(*i*) *Mitford's Pleadings*, p. 208, 2d Edit. Anon. 3 Atk. 70. *Roche v. Morgell*, 2 Sch. & Lefr. 728.

(*k*) *For. Rom.* 279, recognised, 2 Sch. & Lefr. 728.

(*l*) *Roche v. Morgell*, Dom. Proc. 2 Sch. & Lefr. 728.

(*m*) *Willis v. Jernegan*, 2 Atk. 252.

(*n*) 2 Vern. 276.

(*o*) *Denton v. Shellard*, 2 Ves. 239.

(*p*) *Duke of Marlborough and Strong*, 8 March 1721. Dom. Proc. Lord Harcourt's MS. Tables.

(*q*) *Vernon v. Vawdrey*, 2 Atk. 119.

(1) Vide *Murray v. Toland*, 3 Johns. Ch. Rep. 569. 575. Where the agent of a merchant in one country, delivers goods to a merchant abroad, for sale, and settles the account of sales, as stated by him, with full knowledge of all the facts, and without fraud, the settlement is conclusive upon the principal, especially, after an acquiescence of several years. *Murray v. Toland*, 3 Johns. Ch. Rep. 569. And so, if a merchant abroad sends goods to a merchant here, by his order, or that of his agent, which are received with the invoice, and accepted, without objection, he cannot afterwards object that the goods were overcharged. *Consequa v. Fanning*, 3 Johns. Ch. Rep. 587. S. C. on appeal, 17 Johns. Ch. Rep. 511.

(2) And so, an account will not be opened, after judgment and execution, and sale under a mortgage bond, though there be some irregularity in the accounts. *Bloodgood v. Zelly*, 2 Caines' Cas. in error, 124. Nor is a defendant entitled to open an account, unless a sufficient reason has been alleged in the answer, for that purpose. *See v. Bloom*, 20 Johns. Rep. 669. S. C. 5 Johns. Ch. Rep. 366.

(3) So, where a merchant, in embarrassed circumstances, borrowed money, at usurious interest, at different times, of his clerk, who took various bonds and se-

settled by Arbitrators, it is not conclusive if an error can be shown in the Account (r). But if a Bill be filed to impeach a settled Account, specific Errors must be shown (s), except, perhaps, in the case of an Attorney, where upon the face of the Account the Attorney admits that he has not given credit, and produced that state of his affairs which the Client was entitled to have (t); but where the Accounts are not required to be set aside for fraud, but, letting them stand, it is sought to surcharge and falsify them, it is a fixed Rule that some error must be charged, and this though the Account contain the usual words, *103] **"Errors excepted (u) :"* for it is impossible for the Defendant to defend himself, if under a general charge, not specifying any error, the Plaintiff may come at the hearing with the proof of those errors of which the Defendant has heard nothing (x). (1) There must be error enough upon the Bill to show there is reason for it; and if the Plaintiff proves some of those Errors, he entitles himself to a Decree (y).

Where a Bill was filed for an Account, and a settled Account was suggested by the Answer, but not proved, liberty was given in the Decree to surcharge and falsify, if the Master should find any settled Account (z). When parties are thus at liberty to *surcharge and falsify*, they are not confined to mere *errors of fact*, but may take advantage of *errors in Law (a)*.

Where liberty is given to surcharge and falsify, the *onus probandi* is always on the party having that liberty; for the Court takes it as a stated Account, and establishes it; but if any of the Parties can show an omission for which credit ought to be, that is a surcharge; or if any thing is inserted that is a wrong charge, he is at liberty to show it, and that is falsification; but that

(r) *Tottenson v. Peat*, 3 Atk. 530.

(s) *Anon.* 2 Freem. 62. *Chambers v. Goldwin*, 5 Ves. 837. *Dawson and Dawson*, 1 Atk. 1; and see *Drew v. Power*, 1 Sch. & Lefr. 192.

(t) *Matthews v. Walwyn*, 4 Ves. 125.

(u) 3 Bro. C. C. 266; yet see *Proud v. Combs*, 2 Freem. 193.

(x) *Chambers v. Goldwin*, 9 Ves. 266.

Taylor v. Haylin, 2 Bro. C. C. 310; and see *Bourke and Bridgman*, 2 Barn 272. *Johnson against Curtis*, 3 Bro. C. C. 266.

(y) *Twogood v. Swanston*, 6 Ves. 486.

(z) *Kinsman v. Barker*, 14 Ves. 579.

(a) *Roberts v. Kuffin*, 2 Atk. 112. S. C. Barn. 259.

curities for such loans, including a period of ten years, during which time, the parties made frequent settlements of their accounts, for which new and further securities were taken, the Court ordered the bonds, and settlements to be set aside, and the accounts between the parties, to be opened generally, from the commencement of their transactions; there being not only evidence of mistakes, but of oppression, and undue advantage taken of the necessities of the principal. *Barrow v. Rhinelanders*, 1 Johns. Ch. Rep. 550.

(1) On an order for a reference, where the charges in the bill are specific, setting forth the items of the account, &c. the inquiry will not be opened beyond the special matter charged, although the bill may, in the conclusion, contain a general charge, and a prayer for a full account. *Consequa v. Fanning*, 3 Johns. Ch. Rep. 587. S. C. on appeal, 17 Johns. Rep. 511.

must be a proof on his side ; and that makes a great difference between the general case of an open Account, and where only leave is given to surcharge and falsify, for such must be made out (b). (1)

*It has been laid down as a Rule, to be departed from [*104 only on very special circumstances, that a Man standing in the Relations of Agent, Auditor, Land Steward, and Manager, is bound to keep regular Accounts of his transactions on behalf of his Employer ; not only Accounts of Payments, but Accounts of Receipts (c) ; and if he has neglected to keep regular Accounts he will not be permitted to make a demand for Work and Labour in that character, with reference to which he has kept no Account (d).

And if an *Agent* or *Bailiff* has confounded his Principal's property with his own, he is chargeable for the whole, except what he can prove to be his own. (2)

Bills for Tithes are, as matters of Account, very frequent in the Court of Chancery, but the Jurisdiction of the Chancellor in *Tithe* causes is confessedly no part of his proper and natural Jurisdiction (e) : it is not an original Jurisdiction (f), but was assumed as incidental and collateral to an Account and Discovery (g). It was not till after the Restoration that the Jurisdiction of the Chancellor, in this respect, was completely established (h). In the 29th Charles II. Lord Nottingham declared that the Court of Chancery had cognizance in matters of Tithe, as *well as the Exchequer, and that the Plaintiff had his [*105 choice of the Court (i). The Court of *Exchequer* is the original and proper Jurisdiction for *Tithes* (k), that Court having for

(b) *Pitt v. Cholmondeley*, 2 Ves. 566.

(c) *Middleditch v. Sharland*, 5 Ves. 90, 1.

(d) *White v. Lady Lincoln*, 8 Ves. 369. 371. 375. *Lupton v. White*, 15 Ves. 432. So, in Lord Harcourt's MS. Tables, it is said, "A Factor or Agent shall have no salary allowed where he acts against the Interest of his Principal, *Maxwell x. Sharp*, 10th May, 1721."

Dom. Proc.

(e) *Gwillim's Tithe Cases*, p. 790.

(f) *Ib.* p. 1086. 7 Bro. P. C. 110, 111.

Toml. Ed.

(g) See 3 Black. Comm. 437.

(h) *Vid. Hargr. Co. Litt.* p. 159 a, note 4.

(i) See *Gwillim's Tithe Cases*, p. 1084.

(k) 3 Atk. 247.

(1) A party cannot be permitted to surcharge, and falsify an account, unless upon the ground of mistake or error distinctly charged. *Stoughton v. Lynch*, 2 Johns. Ch. Rep. 209.

(2) An agent, who has fairly accounted to his immediate principal, is not liable to account to a person beneficially interested, or standing in the relation of *cestui que trust* to the principal. *Tripler v. Olcot*, 3 Johns. Ch. Rep. 473. And where a consignee of goods sells some of them on credit, and settles with the consignor, and pays him the full amount, he cannot afterwards support a claim to be reimbursed, on the ground of a bad debt in the sale. *Consequa v. Fanning*, 3 Johns. Ch. Rep. 567. S. C. on appeal, 17 Johns. Rep. 511. So, where the defendant received a note to collect for the plaintiff, and the maker being reputed to be insolvent, another person proposed to pay two-thirds of the debt, which was made known to the plaintiff, who made no objection, and the defendant received the two-thirds of the debt and gave up the note, it was held that the defendant was liable for no more than he received. *Armstrong v. Gilchrist*, on appeal, 2 Johns. Cas. 424.

centuries taken conuzance of them ; the ground of which probably, was, that *Tithes* were considered as part of the possessions of the Crown, and therefore the *Exchequer*, as a Court of *Revenue*, had Jurisdiction respecting them (l). Lord Nottingham, however, seems to have dated the origin of the *Exchequer* Jurisdiction over *Tithes* in the reign of Henry VIII. (m). There is some difference in these *Tithe* cases, as to the proceedings in the Court of Chancery and the *Exchequer*. In the *Exchequer*, an Account of *Tithes* is decreed, not for the future, but only up to the time of bringing the Bill ; but in the *Court of Chancery* the decree is for an Account up to the *time of the Decree*, as said in some cases (n) ; or as Lord Hardwicke says, in another case, “down even to the time of the *Master’s Report* (o) ;” or as *Baron Clarke* says, in a third case, “an Account for *Tithes* may be carried on as long as the suit is depending between the Parties (p).” It is observable also, that though the demand for *Tithes* be ever so small and inconsiderable, yet still a Bill in Equity may be filed for the recovery of them (q).

Where the title to *Tithes* is clearly made out, the Court of *106] Chancery, or the Court of *Exchequer*, *decrees an Account ; and where a *modus*, or *real composition* is pleaded, and supported by reasonable evidence, it is the practice to direct an Issue at Law before they decree against the Common Law right of the Parson. The issue from the Court of Chancery is tried in the King’s Bench of Common Pleas ; and an Issue from the *Exchequer* is tried on the Law side of the same Court (r).

By the 87th Henry VIII. ch. 12, s. 19 and 20, it is directed, “that if any variance arise in the city for non-payment of *Tithes*, or if any doubt arise upon the division of any rent, or *Tithes*, or of any assessment thereof, or upon any other thing contained in this Decree, upon complaint made by the party grieved, the Mayor, by the advice of counsel, shall call the parties before him, and make a final end, with costs, to be awarded by the direction of the Mayor, and his assessments according to the decree ; but if the Mayor make not an end thereof within two months, or if any of the parties find themselves aggrieved, the Lord Chancellor, upon complaint made to him within three months next following, shall make an end in the same with costs.” But this particular Jurisdiction thus created did not extinguish the ancient Jurisdiction, it being a Rule, that an Act of Parliament creating a special

(l) 2 Freem. 27. 2 Ch. Cas. 237. Gwillim, 527.

(m) Vid. Har. Co. Litt. p. 159. n. 4, and Hard. 236. 1 Freem. 303, there cited.

(n) Vid. 2 Atk. 136. 2 P. Wms. 463. Darleton v. Brightwell.

(o) 2 Atk. 137.

(p) Bell v. Read, 3 Atk.

(q) 4 Bro. P. C. p. 314. Gwillim, p.

(r) Vid. Lygon and Strutt, 2 Anstr.

Baker and Athill, 2 Anstr. 493.

Jurisdiction never ousts the Jurisdiction of Westminster Hall, without special Words (s).

* The right of a Court of Equity to decree an Account [*107 and payment of Tithes, at the suit of a Person claiming such Tithes, must, as before observed, be grounded on a clear, unquestionable, legal right to Tithes in the Plaintiff, or in some person in Trust for him; the right to the Account being merely consequential to the legal right to the Tithes (t): and Courts of Equity have therefore constantly made a distinction between those cases in which the Title of Plaintiff to the Tithes claimed is not generally disputed; as, where it is objected only that the Lands from which they are claimed are exempt, or discharged from payment of Tithes; or, that the Tithes claimed are not payable in kind, but are to be satisfied in some other manner, as by payment of a modus, or composition real; and those cases, in which the Title to the Tithes claimed is denied to the Plaintiff, and a Title is set up in another Person. In the first description of cases, the Defendant claiming the benefit of an exemption or discharge, or of a modus, or real composition, acknowledges the original Title of the Plaintiff, as alleged by him, but qualifies that Title either by an absolute discharge from payment of the Tithes demanded, or by a right to satisfy that demand otherwise than by payment of the Tithes in kind. In the second description of cases, the existence of that Title to the Tithes in question, which the Plaintiff claims, is absolutely and totally denied, and it is objected, that the Title is in some other Person: and in these cases, if the Person in whom the Title is thus stated, *has had pernanacy of the Tithes [*108 claimed, the Bill is in effect an ejectment Bill, and is to be treated like other Bills in Equity, which may be termed Ejectment Bills, in regard to which, the ordinary practice is, not to make any decree whatever except for the purpose of assisting the Trial of the Title at Law, where such assistance is necessary (u).

If a Rector, Impropriator, or Vicar, file a Bill for Tithes, they must waive all penalties and forfeitures (x) under the Statute (y), for otherwise the Defendant would not be bound to answer; but in a Bill for the single value of Tithes it is not necessary expressly to waive the treble value (z), the paying of the single value being considered as a waiver of the penalties. A waiver

(s) Hard. 116. 130. Kinaston and Miller, 3 Dick. 773; and Warden and Minor Canons of St Paul's v. Cricket, 2 Ves. jura. 563; and vid. Warden, &c. of St. Paul's v. Morris, 9 Ves. 155; and Antrobus and East India Company, 13 Ves. 2.

(t) Strutt v. Baker, 2 Ves. Jan. 628; and see Foxcroft v. Paris, 5 Ves. 232;

and see 7 Bro. P. O. 110, 111. Tomlins' Edition.

(u) Vid. Garnons v. Barnard, 7 Bro. P. O. 110, 111, Tomlins' Edition; Gwillim's Tithe Cases, p. 1470.

(x) 1 Vern. 60.

(y) 2 and 3 Edw. 6.

(z) Woods v. Walley, 1 Anstr. 100; and see Bunb. 193.

in Equity is no bar at Law, but only a ground for the interposition of a Court of Equity, which would grant an Injunction against suing for the penalty, as well upon an implied, as upon an express, waiver (a). (1)

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*CHAP. III.

FRAUD.

UNTIL the abolition of the Court of Star-Chamber, by Statute, (16 Car. I. c. 10) the Chancellor does not appear to have exercised any very extensive jurisdiction in cases of *Fraud*. In that Court the plaintiff was not only relieved, but the defendant was *punished* for his fraudulent conduct ; so that recourse was generally had there in cases of Fraud.

When it is considered, what a variety of transactions in Civil matters may be mixed up with Fraud, every one of which Courts of Equity have a power of sifting to the bottom, through the oath of the fraudulent party, and of relieving against, some conception may be formed of the very extensive nature of the Chancellor's Jurisdiction on that most fruitful head of Equity.

Before we proceed to the consideration of cases founded in *actual Fraud*, it is proper to state the principles that have been laid down with a view to *prevent Fraud*. The doctrine on this subject may be classed under the following heads ;

I. Purchases by Trustees and others, in fiduciary situations, of Trust Property.

(a) 1 Anstr. 100.

(1) 1. The assignees of a bankrupt partner, under a separate commission, are tenants in common with the solvent partner, and having gained possession of the partnership funds, the solvent partner cannot call them out of their hands, or compel them to account. The solvent partner is entitled only to his share of the surplus, after the payment of debts ; and besides, the assignees have higher equities than ordinary tenants in common, for the purpose of a rateable distribution of the joint funds. *Murray v. Murray*, 5 Johns. Ch. Rep. 60.

2. The *bona fide* assignee of an executor, or of the administrator of an executor, cannot be called to an account by legatees, although the assets may be traced and identified. *Rayner v. Pearsall*, 3 Johns. Ch. Rep. 578. And a reference to a master for a further account will be denied, where the administrator of an executor, in his answer to a bill filed by the legatees, &c. of the testator, for an account, sets forth an account, and avers, that he has fully administered, and distributed the surplus ; especially, after the lapse of twelve years. *Ib.*

3. If an executor or trustee be robbed of the trust money, it is a good answer to a bill for an account ; and if the executor or trustee be dead, his personal representative may avail himself of the fact, though it cannot be corroborated by the oath of him, whom he represents. *Furman v. Coe*, 1 Caines' Cas. in Error, 96.

II. *Transactions between Attorney and Client.*

III. *Sales or Agreements by expectant Heirs.*

IV. *Gifts by Ward to Guardian.*

V. *Injunctions.*

*VI. *Bills of Peace.*

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VII. *Bills of Interpleader.*

VIII. *Bills of Certiorari.*

IX. *Bills to perpetuate Testimony.*

X. *Bills of Discovery.*

XI. *Bills Quia Timet.*

XII. *Bills for the delivery up of Deeds, or for securing them, or the delivering up of specific Chattels.*

XIII. *Bills for apportionment or to enforce Contribution.*

XIV. *Bills in Cases of Dower and Partition.*

XV. *Bills to establish a Modus.*

XVI. *Bills to Marshal Securities.*

These Subjects will be considered in succession.

I. Purchases by Trustees and others, in fiduciary situations of Trust Property.

With a view to prevent Fraud (a), a trustee is not permitted to become a purchaser from himself, of part, or the whole, of the Trust Estate (b); nor can the Solicitor of a Trustee purchase the Trust Estate (c). Commissioners (d), Assignees (e), and Solicitors (f), under a Commission of Bankruptcy, whether bidding for themselves or others, are within the operation of *this rule, and are not allowed to purchase the Bankrupt's [*111 Estate. So, too, a Committee, it seems, or the Keeper of a Lunatic (g) is not permitted to purchase the Lunatic's Estate; nor can an Executor purchase his Testator's Effects (h). Governors of a Charity, for the same reason, are not allowed to take leases of the Charity Lands (i); and the rule is applied as between Principal and Steward (k), and also to an Agent (l); and as it seems in alienations between Mortgagor and Mort-

(a) *Lister v. Lister*, 6 Ves. 632.

(b) *Herne v. Moeres*, 1 Vern. 465. *Ayliffe v. Murray*, 2 Ark. 59. *Ex parte Bennett*, 10 Ves. 3. *Coles v. Trecothick*, 9 Ves. 234. *Morse v. Royal*, 12 Ves. 372.

(c) *Downes v. Grazebrook*, 3 Meriv. 200; and *White v. Fussell*, before V. C. Leach, 29 June 1818.

(d) *Ex parte Hughes*, 6 Ves. 617. *Ex parte Morgan*, 12 Ves. 6. *Ex parte Bennett*, 10 Ves. 381.

(e) *Ex parte Lacey*, 6 Ves. 627. *York Buildings Company v. Mackenzie*, 8 Browne's P. C. 42, Tomlins's Edit.

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Ex parte Bennett, 10 Ves. 381. *Ex parte Reynolds*, 5 Ves. 707.

(f) *Ex parte Bennett*, 10 Ves. 381, and see 12 Ves. 372.

(g) *Wright v. Prond*, 13 Ves. 158.

(h) *Burden v. Burden*, 1 Ves. & Bea. 170. *Hall v. Hallet*, 1 Cox 134.

(i) *Attorney General v. Lord Clarendon*, 17 Ves. 500.

(k) *Ormond v. Hutchinson*, 13 Ves. 47. *Beaumont v. Boulbee*, 5 Ves. 599.

(l) *Lowther v. Lowther*, 13 Ves. 95. *Watt v. Grove*, 2 Sch. & Lefr. 492. *Crowe v. Ballard*, 2 Cox. 253.

gagee (*m*) ; but a Mortgagee may, under a Decree, or a Sale in Bankruptcy, buy the mortgaged Estate, and in the latter case, come in under the Commission for the remainder of the mortgage Money not raised by the Sale (*n*), provided he has first obtained an order for leave to bid at such Sale (*o*). A *Residuary Legatee* has not such an Interest as prevents his purchasing under a Decree (*p*).

Lord Hardwicke, in *Whelpdale and Cookson*, determined that a Trustee could not even buy at a *Sale by Auction* (*q*) ; and that decision has been followed (*r*).

*112] *The reason why Trustees are not allowed to purchase the Trust Property, seems to be, because, from their situation, and the knowledge it enables them to acquire, they may be induced to commit a Fraud upon their *Cestui que Trust*. Nor is it necessary, for the purpose of invalidating such purchases, to show, (as was unnecessarily (*s*) done in a great case (*t*),) that the Trustee has made an advantageous purchase (*u*), or that there was Fraud (*x*). Lord Roslyn, it seems, was of a different opinion (*y*) ; but according to the more recent cases, whether the Bargain be advantageous or not, the Sale is, in every instance, bad, for if a Trustee can buy in an honest case, he may in a case having that appearance, but which, from the infirmity of human testimony, may be grossly otherwise (*z*). So very jealous is the Court of a Trustee taking advantage of his situation to benefit himself, that it has been held, that a Trustee could not even purchase, for his own benefit, Property which the owner refused to sell to the *Cestui que Trust* (*a*) ; nor could the *Cestui que Trust*, it seems, under such circumstances, insist on having the Lease (*b*).

*113] *If on a purchase by a Trustee it is found to be for the benefit of an Infant *Cestui que Trust* that the Purchaser should be held to his Purchase, it will not be set aside (*c*).

(*m*) See *Webb v. Rorke*, 2 Sch. & Lefr. 673. *Gubbins v. Creed*, *ibid.* 218.

(*n*) Anon. MS. 1816.

(*o*) *Ex parte Marsh*, 1 Madd. Rep. 148.

(*p*) *Hooper v. Goodwin*, Coop. 95.

(*q*) 1 Ves. 9 ; and see Decree in that case in 5 Ves. jun. 682 ; and in *Belt's Supp. to Vesey*, p. 8.

(*r*) *Lister v. Lister*, 6 Ves. 631. *Sanderson v. Walker*, 13 Ves. 602. In *ex parte Bennett*, 10 Ves. 393, Lord Eldon is reported to have said that Lord Hardwicke, in *Whelpdale and Cookson*, "intimated an opinion that a Trustee might buy at a Sale by Auction ;" but in this he must have been mis-reported, because Lord Hardwicke in that case expressly decided he could not, as

is indeed observed by Lord Eldon in *Downes v. Grazebrook*, 3 Meriv. 207, 8.

(*s*) See *Ex parte Lacey*, 9 Bro. C. C. 627.

(*t*) *Fox against Macreath*, 9 Bro. C. C. 400. S. C. 2 Cox 320.

(*u*) *Ex parte Bennett*, 10 Ves. 393.

(*x*) *Whelpdale v. Cookson*, 1 Ves. 9.

(*y*) See 10 Ves. 385. 395 ; and *Ex parte Lacey*, 6 Ves. 627.

(*z*) *Ex parte Bennett*, 10 Ves. 385.

(*a*) *Ib.* 395 ; and see *Brewett v. Millett*, 7 Bro. P. C. 367. *Tomlin's Edit.* and *Annesley v. Dixon*, *ib.* 213.

(*b*) See the case, 1 Sch. & Lefr. p. 131.

(*c*) *Sanderson v. Walker*, 13 Ves. 603. *Lister v. Lister*, 6 Ves. 631.

But though the rule be that a Trustee cannot purchase from himself, he is allowed to purchase from his *Cestui que Trust*, provided there is a distinct and clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, and there is no Fraud, no concealment, no advantage taken by the Trustee of information acquired by him in the character of Trustee (*d*).

If an Estate be vested in Trustees for Sale for the benefit of an Infant, and the Trustee is desirous of becoming a Purchaser, he may file a bill for the purpose of carrying the Trust into execution, under the direction of the Court, and upon the Sale apply to the Court for leave to become the Purchaser, upon offering to give more than any other person (*e*).

It has been held that an *Auctioneer* may buy property he is employed to sell (*f*), but this doctrine seems questionable (*g*).

An Attorney is not permitted to purchase any thing in litigation, of which litigation he has the *management (*h*); and [*114 if employed as an agent to purchase for another, he cannot buy for himself until his office of attorney is ended (*i*). In all these cases the Property is again put up to Sale at the risk of the Persons who have improperly purchased it (*k*).

Laches will have effect in the Cases we have been treating upon; for if a Trustee has bought the Trust Estate and remains in possession a length of time as absolute owner, without impeachment of his purchase, the *Laches* of the *Cestui que Trust* will materially affect his Title to relief (*l*). Where several Trustees have purchased the Trust Estate, and a Bill is filed to set such Sale aside, all the Trustees or their representatives, must be Parties, because they are liable to costs (*m*).

II. Transactions between Attorneys and Clients.

From many cases it appears that Attorneys are not allowed to deal with their clients upon exactly the same terms upon which men at large may deal with each other (*n*). Transactions liable to no objection as between Man and Man, have, when between Attorney and Client, been overturned, on account of the danger

(*d*) *Coles and Trecothick*, 9 Ves. 246, approved by Lord Erskine, in *Morse and Royal*, 12 Ves. 373. *Fox v. Maereath*, 2 Bro. C. C. 400. S. C. 2 Cox 320; and see *Saunderson v. Walker*, 13 Ves. 601. *Clark v. Swaile*, 3 Eden 184. *Ex parte Lacey*, 6 Ves. 625. *Downes v. Grasebrook*, 3 Meriv. 208.

(*e*) *Campbell v. Walker*, 5 Ves. 681.

(*f*) See *Prestage v. Langford*, mentioned 3 Wood. Lect. 448, in note.

(*g*) Lord Eldon has expressed a long opinion against the validity of such a Sale. Anon. 15 Jan. 1804. MS.

(*h*) *Hall v. Hallet*, 1 Cox 134.

(*i*) *Smith v. Midgley and others*, 15 Dec. 1804, MS. and see Reg. Book. Ann. 1804. Lib. B. fol. 1894.

(*k*) *Lister v. Lister*, 6 Ves. 623.

(*l*) *Webb v. Rorke*, 2 Sch. & Lefr. 572. *Campbell v. Walker*, 5 Ves. 678. *Whichcote v. Lawrence*, 3 Ves. 740; but see *Attorney General v. Dudley*, Coop. 146.

(*m*) *White v. Fussell*, before V. C. Leach, 29 June 1818.

(*n*) *Newman v. Payne*, 2 Ves. jun. 201.

from the influence of Attorneys or Counsel over Clients while having the care of their Property ; and whatever mischief may *115] arise in *particular cases, the Law, with the view of preventing public mischief, says they shall take no benefit derived under such circumstances. If the Relation has completely ceased, if the influence can be rationally supposed also to cease, a Client may be generous to his Attorney or Counsel as to any other person (o).

It is different where the Attorney is also a Relation of the Client ; and the Client, from motives foreign to his character of Attorney, and from a view to prefer him to other Relations, makes a conveyance to the Attorney, for in such case it will be supported (p).

A Client may make a voluntary gift to his Attorney or Agent (q), and if unaffected by fraud, misrepresentation or circumvention, it cannot be set aside (r) ; (1) but in such cases, third persons ought, from motives of delicacy and prudence, to be called in ; for if not, a suspicion attaches upon the transaction, and so much so, that a court of Equity will always give a party his costs, where such a transaction is inquired into by proceedings in Equity (s).

An Attorney may *purchase* of his Client, but in such case the Attorney to support his purchase, must be able to show that he paid the full amount he could have obtained from any other *116] person (t). The same *Rule prevails, in a sale by an Attorney to his Client (u).

A Grant of Land by a Client to his Attorney, pending a suit for the Recovery of it, is forbidden by the Common Law (x) and by several Statutes (y). So, in Equity, if an Attorney *pen-*

(o) Wells and Middleton, 1 Cox 112; and on Appeal, 4 Bro. P. C. 26. 245. Wood v. Downes, 18 Ves. 127. Oldham v. Hand, 3 Ves. 259; and see Bellew v. Russell, 1 Ball & Beatty, 104; and see what is said in Lord Erskine in Wright v. Proud, 13 Ves. 138.

(p) Bellew v. Russell, Ibid.

(q) Vid Walmsley v. Booth, 2 Atk. 30.

(r) See Cray v. Mansfield, 1 Ves. 279. Oldham v. Hand, 3 Ves. 259. 549.

(s) Harris v. Treemenhere, 13 Ves. p. 40, S. C. MS. and see Huguenin and Basely, 14 Ves. 300; Gibson v. Jeyes, 6 Ves. 277.

(t) Harris v. Treemenhere, 15 Ves. p. 42. S. C. MS.

(u) Gibson and Jeyes, 6 Ves. 278.

(x) Culpa est se immiscere rei ad se non pertinenti, and pendente lite nihil innovetur, 2 Inst. 203.

(y) See Westm. 1. c. 25. Westm. 2. c. 29; and 28 Edw. I. c. 11. "These Statutes," (says Lord Clare in Kennet v. Browne, 3 Ridgw. Parl. Cas. 499,) "very much to the injury of Society, have fallen so much into disuse, that I believe in the memory of man, there has not been an instance in which they have been executed according to the Letter. In my judgment, their disuse has been essentially injurious to Society,

(1) A conveyance by a client to his attorney and scrivener, for the consideration of affection and friendship, and also a sum of money, but less than one third of the value of the land, will not be set aside, there being no evidence of imbecility in the grantor, or of fraud or imposition on the part of the grantee; nor of that relationship between the parties which might excite a suspicion of undue influence. *Wendell v. Van Rensselaer*, 1 Johns. Ch. Rep. 344.

dente lite, or whilst he is doing business for his Client, prevails upon him to give a Security, or to agree to an exorbitant reward, the Court will interfere (z); for no attorney can take any thing for his own benefit pending the suit, save his demand (a). As a Guardian cannot take any thing from his Ward pending the Guardianship, or at the close of it, or at any period, until his influence has ceased to exist; so the obligation upon an Attorney to refrain from taking an extraordinary benefit is at least as strong (b): nor will a subsequent act be considered as a confirmation of the transaction, unless it be separate and detached, and not done under the force, pressure and influence of the former transaction (c).

In a case where a Client had given an Attorney a Bond or Mortgage to secure the payment of what *was charged [*117 to be due to him on account of a Law Suit, the Court relieved the Client, and ordered the Bill to be taxed on the ground of the great power and influence that an Attorney has over his Client (d).

There are cases where under the circumstances the Court has ordered the taxation of an Attorney's Bill after eight (e), seventeen (f), and twenty-one years, and an actual Security given; and even after a security given and payment (g), if the Client can point out in the Bill gross errors and charges amounting to imposition and fraud, he will be relieved (h). The Rule, however, must not, for the sake of Clients, be carried too far, and so as to prevent professional Gentlemen undertaking and carrying on long and expensive suits. Every case, therefore, is considered upon its own circumstances, and a temperate and just consideration applied to each case (i); and where nothing appears but a trifling inaccuracy, the court will not set aside a security though given by the Client while the business was depending (k).

III. Sales by expectant Heirs.

Sales by expectant Heirs are, with a view to prevent Fraud, considered in a different light from Sales by other persons. The

and I should wish to see some public examples of Men prosecuted to justice for breach of these most salutary Laws.'

(z) *Saunderson v. Glass*; 2 Atk. 298.

(a) *Wood and Downes*, 18 Ves. 120. *Wells and Middleton*, 4 Bro. P. C. 26. 245.

(b) 18 Ves. 127.

(c) *Ibid.* 128; and see 2 Sch. & Lefr. 474.

(d) *Walmesley v. Booth*, 2 Atk. 30; approved in *Flenderpleath v. Frazer*, 3

Ves. and Bea. 176. See also *Newman v. Payne*, 2 Ves. Jun. 199. 8. C. 4 Bro. C. C. 350; and *Lewis and Morgan*, 3 Austr. 769.

(e) *Auhrey v. Popkin*, 1 Dick. 430.

(f) *Drapers Company v. Davis*, 2 Atk. 295.

(g) See *Cook v. Settree*, 1 Ves. & Bea. 127.

(h) *Cooke v. Settree*, 1 Ves. & Bea. 127; and see *Langstaffe v. Taylor*, 14 Ves. 262.

(i) *Ibid.*

(k) *Ibid.* p. 126, &c.

*118] *Heir* of a Family dealing for *an *Expectancy* in that Family is distinguished from ordinary cases ; and an *unconscionable* bargain made with him is looked upon as oppressive, and pernicious in principle, and therefore to be repressed. In cases, therefore, of this description, as in cases of Marriage-Broking Bonds, Fraud is not so much the ground of relief as the example and pernicious consequences (*l*) ; and the Court relieves upon general principles of mischief to the Public, without requiring particular evidence of actual imposition (*m*) ; *Lord Nottingham* seems, in one such case, to have denied relief ; but *Lord Jeffries*, on a rehearing, reversed his decision (*n*) : and his decree being considered as just, and discouraging a growing practice of “*devouring an heir*,” to use *Lord Cowper’s* expression, no attempt was made in Parliament to reverse it (*o*). In another case, however, *Lord Nottingham* seems to have agreed with the doctrine of *Lord Jeffries* (*p*). On these principles, where a Son, who after his Father’s death was a remainder-man in Tail, sold his remainder at an *under rate*, it was set aside (*q*). An expectancy may be sold, provided it is fairly sold (*r*) ; but the Court in fa-
 *119] vour of *young Heirs, says, the Vendee shall show that the Bargain was a fair one (*s*). With respect to the term *young Heirs* so frequent in cases of this description, *Lord Eldon* observed, “ I have found it difficult to say what is the age when a man shall cease to be protected by the policy of the Court, as to dealing with Expectancies. Why protect a person of twenty-three, and not a person of twenty-five, or more, if the circumstances of distress are such as to enfeeble the mind of the person who deals ? If a person is in distress, and has dealt for his Expectancy, and paid two for one, and no confirmation, the Authorities show the Court has always interfered, and sifted the transaction (*t*).” (1)

(*l*) *Gwynne v. Heaton*, 1 Bro. C. C. 10 ; and see *Brook v. Gally*, 2 Atk. 35. *Barnardiston v. Lingood*, 2 Atk. 135. *Cole v. Gibbons*, 3 P. Wms. 293. *Bacon’s Tracts*, 278, 9.

(*m*) *Walmesley v. Booth*, 2 Atk. 28, 29.

(*n*) *Berney v. Pitt*, 2 Vern. 14.

(*o*) *Twistleton v. Griffith*, 1 P. Wms. 311, 312.

(*p*) *Nott v. Hill*, 1 Vern. 168. S. C. 2 Chan. Cas. 120, dismissed on a rehearing by Lord Keeper North ; but Lord Nottingham’s decree affirmed on a re-hearing by Lord Jeffries, 2 Vern. 27. See *Day v. Newman*, 2

Cox 80, where the odd fate of this case is stated.

(*q*) *Twistleton v. Griffith*, 1 P. Wms. 310 ; and see *Wiseman v. Beake*, 2 Vern. 121, where a Nephew, near forty years old, was the remainder-man.

(*r*) *Nott v. Hill*, 1 Vern. 167. S. C. 2 Chan. Rep. 120. *Berney v. Beake*, *ib.* 136. *Batty v. Lloyd*, 1 Vern. 141.

(*s*) See what is said in *Coles and Trecothick*, 9 Ves. 246. and in *Evans and Cheshire*, MS.

(*t*) *Evans v. Cheshire*, 1803, MS. and see *Darley v. Singleton*, 1 Wight. 25.

(1) And so relief will be granted not only to young heirs who sell their expectancies, but to all such as are weak, illiterate or necessitous, or not perfectly conversant of their rights, whether they sell their expectancies or absolute estates ; especially, where the purchaser is intelligent and acute, and avails himself of his superior discernment in an unreasonable manner. *Butler v. Heskell*, 4 Des. 697.

Wherever in these cases, the bargain is set aside, though for fraud, the Defendant must pay what was really lent, and in some cases *Interest* has been given (u), in others it has not (x).

Inadequacy of Consideration between persons who stand upon a precisely equal footing, is in Courts of Equity of no account, unless from its grossness it is of itself evidence of Fraud ; but in regard to *expectant Heirs*, (or as it seems, any one dealing with another for an expectancy) any thing that can substantially be considered as inadequacy is a ground for setting aside the contract (y) ; and in *such case the conveyance is set aside [*120 on payment of Principal, Interest, and Costs, the defendant being considered as a Mortgagee (z).

The tendency of these determinations to render all Bargains with expectant Heirs very insecure, if not impracticable, seems not to have been considered as operating to prevent its adoption and establishment ; but, on the contrary, some Judges have avowed that probable consequence, as being to them a recommendation of the Doctrine (a).

In most of these cases, deceit and illusion on third persons, not parties, nor privy to the fraudulent Agreement, have concurred ; the Father, Ancestor, or Relation, from whom was the expectation of the Estate, has been kept in the dark, and the Heir or Expectant has been kept from disclosing his circumstances, and resorting to them for advice which might have tended to his relief and reformation. This misleads the Ancestor, who has been seduced to leave his Estate, not to his Heir or Family, but to a set of artful persons who have divided the spoil beforehand (b).

If, however, a Reversionary Interest be sold by *Auction*, the Purchaser is not bound to show that he has given the full value (c).

It has also been determined that, if Tradesmen, on various occasions, impose upon an expectant Heir, by selling at extravagant prices, a Court of Equity will relieve : but it might be otherwise if there were only *a single instance of a purchase (d). In some of the cases, a distinction has been taken where the Heir has no maintenance from his Father, and is turned out upon unreasonable displeasure taken by the Father ;

(u) As in 1 Ch. 276.

(x) As in Bill v. Price, 1 Vern. 467.

(y) Peacock v. Evans, 16 Ves. 512. Gowland and De Faria, 17 Ves. 20. In this latter case the Father was dead, so that in fact he was not an expectant heir.

(z) See Gowland and De Faria, 17 Ves. 23. Bowes v. Heaps, 3 Ves. & Bea. 117.

(a) Peacock v. Evans, 16 Ves. 514,

515.

(b) Chesterfield and Janssen, 2 Ves. 157.

(c) Shelly v. Nash, 3 Madd. Rep. 232.

(d) See Bill v. Price, 1 Vern. 467. Lamplugh v. Smith, 2 Vern 77. Whittay v. Price, 2 Vern. 78. Brooke v. Galley, 2 Atk. 35. Freeman v. Bishop, 2 Atk. 39. S. C. in Grounds and Rudiments, &c. p. 278, 9.

in which case, if the Bargain is not excessively beyond the proportion of insurances for such risks, such Bargain is allowed to stand, because it is not to supply the luxury and prodigality of the Heir, but to keep him from starving; and since the seller would have lost his money in case the Heir had died during the life of the Father, he ought to have a proportionable benefit for such hazard (e). The Court in relieving an Heir does not consider whether the Estate in expectancy comes to him as heir to his father, and by descent, or from any other relation; but the rule which directs in such case is the necessity that young Heirs are in, for the most part, which naturally lays them open to impositions of this kind. Where an extravagant price is charged for goods sold, and a mortgage is taken to secure it, the Heir may be relieved so far as it stands as a security for the unjust gain; but after it is determined upon a *quantum meruit*, what was the real worth of the goods, the mortgage will still be binding upon the Heir for so much as is found by the verdict (f).

A *Post Obit* given by an *Expectant Heir* has been held bad (g); *122] and certainly he who takes a *Post Obit* has the *onus* thrown upon him of proving the fairness of the bargain (h); whether such a doctrine was wisely laid down has been doubted, since Usurers are thereby incited to ensure themselves by their terms from the risk of the interference of the Court. *Montesquieu* (i) observes, that, "Usury increases in Mahometan countries in proportion to the severity of the prohibition. The lender indemnifies himself for the danger he undergoes of suffering the penalty." If on the death of the person upon whose decease the *Post Obit* is payable, the transaction is, without imposition, confirmed, it cannot be set aside; nor can relief be had, except as to the Penalty (k): for a new agreement may confirm what was at first a *doubtful Bargain*, though it could not be a *void one* (l); but if the confirmation is not freely given, if the Party be distressed, or under the influence of the former transaction, or not fully apprized of his rights (n), and that his act will operate as a confirmation (o), it is not an effectual confirmation (p). Confirmations of Deeds are looked upon with jealousy. Where a

(e) Sir Robert Jason's case, *Lex Prætoria*, MS. Nott and Hill, 2 Ch. Cas. 120. Barney and Blake, *ib.* 136; and see 1 Bro. C. C. 10.

(f) Freeman v. Bishop, 2 Atk. 39. S. C. Barnard 15. and in *Grounds and Rudiments*, &c. p. 278, 9.

(g) Varney's Case, 2 Freem. 63.

(h) Evans v. Cheshire, 1803, MS. Bowes v. Jacobs, 28 March 1808. MS.

(i) Spirit of Laws, B. 22. Ch. 19.

(k) Chesterfield v. Janssen, 2 Ves. S. C. 1 Atk. 301.

(l) See 1 Atk. 354; and see Cole

v. Gibbons, 3 P. Wms. 294, and the strong case mentioned *ibid.* in note (e.)

(n) Dunbar v. Tredennick, 2 Ball & Bea. 317. Cann. v. Cann., 1 P. Wms. 723.

(o) Murray v. Palmer, 2 Sch. & Lefr. 486.

(p) Crowe v. Ballard, 1 Ves. jun. 215. S. C. 3 Bro. C. C. 117, and S. C. 2 Cox 253; and see Roche v. O'Brien, 1 Ball & Bea. 339; and Shirley v. Martin, mentioned by Lord Chancellor in 1 Ball & Beatty, 355, 6.

Post Obit was, from the fear of an Execution, paid, it was not considered as a confirmation, but a re-payment compelled (q).

*If a *Post Obit* be given, and the Obligor and Obligee [*123 of the Bond die, as well as the person on whose Life it was given, and the Bond has been assigned, it will not be set aside, no proof of imposition appearing (r).

The same protective influence, to prevent Fraud, is exercised in the case of,

IV. *Guardian and Ward.*

Where a Man acts as Guardian, or Trustee in nature of a Guardian, for an Infant, a Court of Equity is extremely watchful to prevent such person taking any advantage immediately upon his Ward or Cestui que trust coming of age, and at the time of settling his account, or delivering up the Trust; because an undue advantage may be taken (s). It would give an opportunity, either by flattery, or by force, by good usage unfairly meant, or bad usage imposed, to take such advantage: and therefore the principle of the Court is of the same nature with relief in Courts of Equity on the head of public utility, as in Bonds obtained from young Heirs, and Rewards given to an Attorney pending a Cause, and Marriage-Broking Bonds. All depend on public utility, and therefore the Court will not suffer it, though perhaps, in a particular instance, there may not be actual unfairness (t). The Rule is, in some cases, productive of hardship; as where there has *been great trouble, and the [*124 Guardian has acted fairly and honestly; but Courts of Equity have established it from a persuasion of its utility, and on necessity, and on the principle, that it is a debt of humanity that one Man owes to another, as every Man is liable to be in the same circumstances (u). If, however, the Ward, or Cestui que trust, comes of age, and after actually being put into possession of his Estate, thinks fit, when *sui juris* and at Liberty, to make a reasonable grant, by way of reward for care and trouble, and does this with his eyes open, Courts of Equity will not set such gift aside; but the Court will not permit a gift *at the very time of accounting and delivering up the Estate*, making that the terms of doing their duty (x).

Conveyances of this description have been set aside not only by the Ward himself, but his Representatives (y), and after great

(q) *Curwin v. Milner*, 3 P. Wms. 293, in note, and approved in *Roche v. O'Brien*, 1 Ball & Beatty, 357.

(r) *Hill v. Caillord*, 1 Ves. 123.

(s) See 1 Ball & Beatty, 230.

(t) *Hylton v. Hylton*, 2 Ves. p. 547.

(u) *Hylton v. Hylton*, 2 Ves. p. 549.

(x) See *Ibid.* p. 549. *Cray v. Mans-*

field, 1 Ves. 379. *Griffin and De Vouille*, 3 Wood. Lect. in Appendix, p. 18; and see what is said in *Wright and Proud*, 13 Ves. 138, and in *Wood and Downes*, 18 Ves. 127. *Smith v. Moone*, MS. *Dawson v. Massey*, 1 Ball & Beatty, 219.

(y) 2 Ves. 547.

length of time (*z*). On these principles, where a Gift of Stock was made by a Ward to his Guardian, *immediately upon his coming of Age*, and before his Guardian had delivered over every thing to his Ward, the Deed of Gift was decreed to be delivered up to be cancelled. The Guardian insisted that the Gift to him was as a Reward for his trouble as Guardian, but this defence was not admitted (*a*).

*125] *So, where a Husband *before* his Marriage covenanted to release his Wife's Guardian of all accounts; this was held not to be binding, and was said to resemble a Marriage-Brokage Agreement (*b*).

In like manner, a voluntary Grant of an Annuity by a Ward, a year after he was of age, to his Guardian, at the time when the Guardian pretended to come to an Account and deliver up the Estate to the Plaintiff, was set aside (*c*).

A Guardian has not been allowed to purchase an encumbrance on the Estate of his Ward (*d*).

V. Injunctions.

Injunctions are, in general, granted to *prevent Fraud, or Injustice*, and may therefore be classed under this head of Equity.

The Jurisdiction of the Court as to Injunctions, has been considered as a most useful one; without which, the benefit of an Equity against proceedings at Law could not be had; but as they may be employed to delay the obtaining justice at Law, it has been thought the duty of the Court to prevent, as much as possible, the abuse of that Jurisdiction (*e*).

All Injunctions are discretionary, and granted upon the circumstances of the Case (*f*). (1) Of late years they have been allowed much more liberally than formerly (*g*).

*126] *An *Injunction*, however, can only be obtained against a Party to the Suit (*h*); (2) and in the ordinary case of an Injunction after a Decree, in the absence of a Creditor, no one appearing for him as Counsel, which might make a difference, it seems, he could not be proceeded against for a breach of the Injunction (*i*).

(*z*) *Hatch v. Hatch*, 9 Ves. 292. S. C. 1 Smith's Rep. 226.

(*a*) *Pierce v. Waring*, cit. 2 Ves. 547. 549.

(*b*) *Duke of Hamilton & Ux. v. Lord Mohun*, 1 P. Wms. 118.

(*c*) *Hylton v. Hylton*, 2 Ves. 547.

(*d*) *Henley v. ———*, 2 Cha. Cas. 245.

(*e*) *Travers v. Lord Stafford*, 2 Ves.

20. See what Lord Bacon says of delays occasioned by Injunctions. [4 vol. Bacon's Works, 333, fol. edit.]

(*f*) *Potter against Chapman*, Amb. 99.

(*g*) *Hanson v. Gardener*, 7 Ves. 307.

(*h*) *Dawson v. Princeps*, 2 Anstr. 521. *Gadd v. Worrall*, ib. 555.

(*i*) *Iveson v. Harris*, 7 Ves. 257, 8.

(1) Vide *Roberts v. Anderson*, 2 Johns. Ch. Rep. 202.

(2) Vide *Fellows v. Fellows*, 4 Johns. Ch. Rep. 26.

An *Injunction* is a *prohibitory Writ*, specially prayed for, by a Bill, in which the Plaintiff's Title is set forth (k). restraining a Person from committing or doing an act, other than criminal acts (l), which appears to be against Equity or Conscience (m). The Chancellor's order upon a Petition in Bankruptcy operates as effectually as a Writ of Injunction upon a Bill filed (n). It may be obtained at various stages of a Suit, according to the circumstances of the case.

If the Injunction be wanted to *stay waste*, or other Injuries of an equally urgent nature, upon the filing of the Bill, and an Affidavit, (the Affidavit even of a party convicted of perjury is, it seems, sufficient for this purpose (o),) verifying the urgency and necessity of the Case, the Court will, on *Motion made before the service of the Subpoena*, and without Notice to the opposite Party (p), or if in the *Vacation*, or between *the Seals, on a *Pe- [*127 tition and Affidavit*, and Certificate of the Bill filed (q), grant an Injunction immediately, to continue till the defendant has put in his answer, or the Court shall make some further Order concerning it. When the answer comes in, the Defendant may move to dissolve the Injunction, and the Court will on such Motion order the Injunction to stand dissolved at a short day fixed by the Court, unless cause is shown to the contrary, and whether it shall then be dissolved or continued till the hearing of the cause is on such day determined by the Court, upon Arguments drawn from considering the Answer and Affidavit together; or if no cause is shown, then, upon Motion, and an Affidavit of the due service of the Order, the order for dissolving the Injunction will be made absolute; but these are matters of Practice, and will be more fully considered, when we come to treat of the Practice of the Court.

An Injunction is, under circumstances, proper, and may be obtained, in the following cases;—I. *To stay proceedings in other Courts, as in the Exchequer, the Spiritual Court, or Court of Admiralty, or to stay proceedings in a Court of Law*; II. *To restrain the Infringement of Patents*; III. *To stay Waste*; IV. *To restrain the Sale of Books, Printed Music, or Prints*; V. *To restrain the Negotiation of Bills of Exchange, Notes, &c. or the Transfer of*

(k) Mitf. Pleading, p. 124.

(l) See 6 Mod. 16. If, therefore, a Bill is brought for relief against a proceeding at Law upon a criminal prosecution, as an Indictment, or Information, or a Mandatory Writ, as a Writ of Prohibition, a Mandamus, or any Writ which is Mandatory and not remedial, the Defendant may demur. (Ferr. 38. 2 Ves. 398.

(m) Bacon's Abr. 648.

(n) 1 Christian's Bank Law, p. 297. Saxton v. Davis, 1 Rose 79.

(o) See Bowyer v. M. Evoy, 1 Ball & Beatty, 564, 5.

(p) An Injunction against waste will be granted, though the defendant appear the day before the motion. Aller v. Jones, 15 Ves. p. 605. Perhaps it might be different where he had appeared long enough to have enabled the plaintiff to give notice. See lb.

(q) See what is said in Kington v. Eve, 2 Ves. & Bea. 351.

Stock; VI. *To prevent the committing of Nuisances.* These are the principal cases in which Injunctions are granted; but there *128] are others in which they are *allowed, not classable under those heads, but which will, however, be considered: 1. *As to an Injunction to stay Proceedings in other Courts.* Where two Courts have a concurrent Jurisdiction of the same thing, that Court is entitled to retain the Suit in which it is commenced, and may enjoin any other Court from proceeding in the Suit. It has, however, been decided (r), that if a Bill is brought in the Exchequer to foreclose, the Defendant may file a Bill in the Court of Chancery to *redeem*, and that a Plea of the former Suit cannot be sustained. It may be true that such *Plea* is bad; but the Court of Exchequer, perhaps, might on application have given the Party relief by means of an Injunction.

So in those Cases in which the Court of Chancery and the Spiritual Courts have a concurrent Jurisdiction, the Court of Chancery will not (with some exceptions that will presently be mentioned,) hinder the Spiritual Court, being first possessed of the Suit, from proceeding in it (s).

If a Suit is instituted in the *Spiritual* Court for *Tithes*, and a *Modus* is set up as a defence, the Court of Chancery or of Exchequer, will grant an Injunction to stay proceedings in the Spiritual Court (t); or, a *Prohibition* may be obtained on application to a Court of Law (u). But if a Suit is there instituted for subtraction of Tithes, and the Defendant brings a Bill to establish a *Modus*, and on the bare suggestion of a *Modus*, moves *129] for an *Injunction to stay the proceedings in the Ecclesiastical Court, it will not be granted. If, indeed, the *Modus* pleaded, is *admitted*, the Ecclesiastical Court may then proceed upon the *Modus*; but if *denied*, that Court cannot proceed, *propter triationis defectum* (w); but where a Bill was brought in the Ecclesiastical Court to establish *Modusses*, some of which the Defendant admitted, and *denied the rest and greatest part*, the Court of Exchequer granted an *Injunction* (x). So, where there have been mutual accounts of different matters between the Parson and the Parishioner, Equity will restrain by Injunction the Parson from proceeding in the Ecclesiastical Court for an account of Tithes (y).

The Court of Chancery will, on a Bill filed, grant an Injunction to the *Spiritual* Court, to stay the *Husband's* proceedings in that Court to obtain a *Legacy* given to his *Wife*; because that Court cannot compel the Husband to make an adequate Provision or settlement on his Wife, as the Court of Chancery will

(r) *Earl of Newburgh v. Wren*, 1 Vern. 220.

(s) *Præc. Ch.* 546.

(t) 1 *Fowler*, 311; see *Bunb.* 176.

(u) *French v. Trask*, 10 *East.* 348.

(w) *Bunb.* 176.

(x) *Rotherham v. Fanshaw*, 3 *Atk.* 627.

(y) *Anon.* 23d October, 1745, MS.

oblige him to do, before it will permit him to receive the Legacy (z).

Where a Suit is instituted in the *Spiritual Court* for an Infant's Legacy, by a Father, the Court will grant an Injunction, because it will not allow the money of an Infant to come into the Father's hands. It does not grant the Injunction because the Spiritual *Court have not a Jurisdiction in Legacies, but from the [*130 general care it takes of Infants (a).

In all *Cases of Legacies*, where there is a *Trust*, or, as it has been said, *any thing in the nature of a Trust*, the Court of Chancery will grant an Injunction, *Trusts* being proper only for the Cognizance of that Court (b).

An Injunction to stay proceedings in the *Admiralty Court*, in a Suit for the condemnation of a Ship, on the ground that a note had been obtained by duress from the Captain, acknowledging the Right of capture, has been refused, as the Court of Admiralty has sufficient authority to investigate the circumstances (c).

An Injunction may, on proper grounds, be obtained to stay proceedings in a Court of Law (1). Such Injunctions issue by

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| (z) <i>Tanfield v. Davenport</i> , Tot. 114;
<i>Nicholas v. Nicholas</i> , Prec. Ch. 348;
see also <i>Meal v. Meal</i> , 1 Dick. 373;
<i>Blount v. Bestland</i> , 5 Ves. 517. Anon.
1 Atk. 491. <i>Jewson v. Moulson</i> , 2 Atk.
420. | (a) <i>Rotherham v. Fanshaw</i> , 3 Atk.
629.
(b) Anon. 1 Atk. 491; see also 1
Dick. 98. <i>Stonehouse v. Stonehouse</i> , 2
Dick. 769. <i>Smith and Kempson</i> .
(c) Anon. 3 Atk. 350. |
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(1) And a court of chancery will not grant an injunction to stay proceedings at law on a negotiable promissory note, the consideration of which is illegal: As where the vendee of a pretended title to lands, gave his notes to the vendor, for the purchase money; for, in such case, the parties being in *pari delictu*, they will be left to pursue their remedies, if any, at law. *Woodworth v. Jones*, on appeal, 2 Johns. Cas. 417.

So, an injunction will not be granted to stay proceedings, in cases where the party may have adequate remedy at law: Thus, an application to stay a sale under an execution, on the ground that the judgment has been satisfied, will be denied; for the sale may be stopped by an order of the judge. *Lansing v. Eddy*, 1 Johns. Ch. Rep. 49. Nor will it be granted, after judgment, on a bill charging usury, and seeking a discovery, and a return of the excess beyond the lawful interest, for the usury would have been a good defence at law. *Ibid.* Nor will it be granted to stay proceedings on an usurious contract, on a bill for discovery, unless the plaintiff offers, or brings into court, the money actually lent, with lawful interest. *Rogers v. Rathbun*, 1 Johns. Ch. Rep. 367. *Tupper v. Powell*, 1 Johns. Ch. Rep. 439.

And generally, where a defendant, in an action at law, has not used due diligence in preparing his defence, or in applying for a discovery, he cannot, after verdict, obtain the aid of the court to stay proceedings at law, or to have a new trial. *Barker v. Elkins*, 1 Johns. Ch. Rep. 465. *Dodge v. Strong*, 2 Johns. Ch. Rep. 228.

In such cases, the rule in chancery is, not to relieve against a judgment at law, on the ground of its being against equity, unless the defendant was ignorant of the fact in question, pending the suit, or unless it could not have been received as a defence. *Lansing v. Eddy*, 1 Johns. Ch. Rep. 51. *Simpson v. Hart*, 1 Johns. Ch. Rep. 98. *Foster v. Wood*, 6 Johns. Ch. Rep. 87.

Nor will chancery review the determinations of courts of law, in relation to matters properly within their jurisdiction. Thus, where a summary application was made, in the first instance, to a court of law, for a set-off of judgments, which was denied, the court of chancery refused to sustain a bill for an injunction and

the order and under the Seal of the Court, not on account of any Supremacy which the Court assumes over a Court of Law, but in respect of its Jurisdiction in a Court of Equity by which it controls the *Party*, and not the *Court*, from proceeding at Law (*d*). The Court of Chancery in these cases admits the Jurisdiction of the Court of Common Law; and the ground on which it issues the Injunction is, that the Parties are making use of the Jurisdiction contrary to Equity and Conscience (*e*).

The Court, it seems, may enjoin against proceedings in any *131] part of the kingdom; for instance, it may *restrain the entering up of a Judgment, or carrying on any Action in the Court of Great Session in Scotland (*f*).

Such Injunctions are sometimes used to stay Trial, or after a Verdict to stay Judgment, or after a Judgment to stay Execution, or proceedings under an execution (*g*); or if Execution has taken place, to stay the money in the hands of the Sheriff; or if part only of a Judgment Debt has been levied by a *feri facias*, it may issue to restrain the suing out of a *Capias ad satisfaciendum* (*h*). And where such Injunctions are prayed by the Bill, there is commonly a suggestion in it that the Complainant is not able, for some reasons therein stated, to make his defence in the other Court, though he hath a good discharge in Equity; or that the other party proceeds at Law for a penalty, and threatens to make the Complainant pay; or that the other Court has not Jurisdiction of the Cause which is cognizable in the Court where he files his Bill; or that the other Court refuses some rightful advantage, or does injustice to him in the proceedings, or has not power to do him right (*i*).

An Injunction to stay execution is never granted except for want of Appearance or Answer (unless where a warrant of Attorney has been fraudulently obtained) because the Parties ought to have applied sooner; nor can an Injunction be obtained to prevent the Sheriff selling under an execution, unless an Injunction *132] has been previously obtained against the *Defendant to stay execution, and the Sheriff when enjoined may sell under subsequent executions (*k*).

In an ancient case, (22 Edw. IV. fol. 37.) Hussey, Ch. Just. says, "If after Judgment, the Chancellor grant an Injunction, and commit the Plaintiff at Law to the *Fleet*, the King's Bench

(*d*) See what is said, 1 Atk. 630.

(*e*) Hill v. Turner, 1 Atk. 516.

(*f*) Wharton v. May, 5 Ves. 71.

(*g*) See Lady Arundel and Phipps, 10 Ves. 144. Codd against Woden, 3 Bro.

C. C. 73. Prac. Reg. 901.

(*h*) 3 Wood. Lect. 406, 7.

(*i*) Prac. Reg. Wyatt's Edit. p. 232.

(*k*) Rouse v. Wood, before Lord Chan. Mich. Term 1816, MS.

set-off. Simpson v. Hart, 1 Johns. Ch. Rep. 91. But see the same case, on appeal, 14 Johns. Rep. 63, wherein it was held by the Court of Errors, that the decision of the Court of Law was not so far *res judicata*, as to preclude all inquiry into the subject matter; and the decree in chancery was therefore reversed.

will by *Habeas Corpus* discharge him." This doctrine is not now sustainable; but it plainly intimates that Injunctions *before Judgment* were even at that early period sustainable. The issuing of such Injunctions formed one of the grounds of Impeachment against *Cardinal Wolsey* (l); but precedents of Injunctions even after a Judgment at Law, might, before his time be adduced, as was shown in the course of the memorable dispute on this subject in the reign of James the First, between Lord Bacon and *Sir Edward Coke* (m).

If an Injunction be prayed to stay proceedings at Law upon a Bond, the Plaintiff must agree to give Judgment, and be bound by order to bring no Writ of Error (n).

In the *Exchequer*, an Injunction stays all proceedings in whatever stage they are. Sometimes, however, the Court will on motion permit notice of Trial to be given, on an undertaking not to sue out Execution (o). But it is not so in *Chancery*; for there, if on service of the Injunction the Defendant hath not *commenced his Action, he cannot sue out Process; if [*133 he hath, but not served the same, or having served it, hath not delivered or filed any Declaration, he cannot proceed; but if there has been a declaration, he may call for a Plea, and for want of it sign a Judgment; or if the cause is at Issue, he may go on to Trial, and if that hath been had, and a verdict obtained, he may proceed to Judgment, and affirm, if Error hath been brought; but if Judgment hath been executed, and the Debt and Costs levied thereon, the Sheriff cannot pay the same to the Defendant, *Execution being stayed* till Answer or further order (p).

Where a Defendant is *abroad*, there must be a special ground to show that the discovery required from him is material, before an Injunction will be granted (q). The affidavit should state that "the Plaintiff is advised, and verily believes, he cannot safely go to Trial without the Answer; and that he verily believes the Answer will produce discovery material to the just Trial of the Action (r)." The Court never examines how far this Affidavit is well founded, but trusts the Affidavit of the Plaintiff, instead of itself determining the merits at Law, unless it appears clearly on the face of the Bill that the Discovery would be immaterial, in which case the Injunction would be refused (s).

An Injunction will not be extended to *stay Trial* just at the time of the Assizes, unless the Plaintiff *will give Security [*134

(l) See Fidler's Life of Wolsey.

(m) See the proceedings on this occasion in "Jurisdiction of Chancery vindicated," at the end of vol. 1 Cha. Rep. and in the Biog. Brit. by Kippis, Art. "Coke."

(n) Anon. 1 Vern. 120.

(o) See Legg v. Da Costa, mentioned

3 Wood. Lect. 410, 411, in note.

(p) See 1 vol. Hind, p. 222; and see Bishton v. Birch, 2. Fes. & Bea. 41.

(q) Revet against Braham, 9 Bro. C. C. 640.

(r) White v. Steinwacke, 19 Ves. 84. Hartley v. Hobson, 2 Cox, 117.

(s) White v. Steinwacke, 18 Ves. 85.

the Joint Property, an Injunction may be obtained till the Partnership affairs are wound up (*l*) ; but if the trade was carried on in the West Indies as well as in London, an Attachment by a Creditor of Property belonging to the Firms in the West Indies, where the solvent Partners resided, could not be impeached ; because the West Indian Partners could not be controlled in the *137] management of their Trade, or restrained by any *proceeding here, from paying and applying the Partnership Assets as they think fit (*m*). An injunction will lie to stay proceedings in the *Lord Mayor's Court* (*n*).

It has been holden that the Chancellor has no Jurisdiction to stay, by Injunction, the Process of a Court of Law upon an Award made a Rule of Court under the Stat. 9 and 10 Wm. 3. c. 15 (*o*). It would be different, it seems, if the Award were made in the course of the Cause (*p*).

II. An Injunction may be obtained to restrain the Infringement of a Patent. If one obtains a Patent, and has been long in the exclusive enjoyment of it, an Injunction will be issued against a Person invading it, until the right is tried at Law ; and this, although the Chancellor may be doubtful whether the Patent is good (*q*) ; but if the Patent be clearly bad, an Injunction will not be granted (*r*). Formerly in the case of a Patent, on opening the case, the Party was sent to Law to establish his right, and then came back for an Account (*s*) ; but as the right under Letters Patent appears on Record, it has been held unnecessary to establish the right at Law previous to the filing of a Bill (*t*), unless the Patent be recent (*u*). An Injunction, however, in *138] *these cases, will be refused, unless the Plaintiff swear as to his belief he is the original inventor (*v*), and undertakes immediately to bring an Action.

There can be no exclusive right in a subject (a Secret or Recipe for preparing a Medicine, for instance) not protected by Patent ; nor can a person be prevented selling it under the same Title if he does not assume the name and character of the Inventor (*w*).

If a Patent for an invention is restrained to England, it will not extend to Ireland. There must be a distinct Patent under

(*l*) *Barker v. Goodair*, 11 Ves. 78.

(*m*) *Brickwood v. Miller*, 3 Meriv. 279.

(*n*) *Barker v. Goodair*, 11 Ves. 78. In *Rew v. Dixon*, 6 May 1817, such an Injunction was granted.

(*o*) *Gwinnett v. Bannister*, 14 Ves. 530.

(*p*) *Ib.* p. 532.

(*q*) *Hill v. Thompson*, 3 Meriv. 622 ; *Harmer and Plane*, 14 Ves. 130 ; and see the *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 707.

In *Newsham v. Gray*, 2 Atk. 286, an issue appears to have been directed, but no Injunction in the meantime ; and see *Hill v. University of Oxford*, 1 Vern. 275.

(*r*) See *Grierson v. Eyre*, 9 Ves. 341.

(*s*) *Dodsley against Kinnersley*, Amb. 406. *Anon.* 1 Vern. 120.

(*t*) *Redesd.* Tr. Plead. 119.

(*u*) *Hill v. Thompson*, 3 Meriv. 622.

(*v*) *Hill v. Thompson*, 3 Meriv. 622.

(*w*) *Canham v. Jones*, 2 Ves. & Bea. 248.

a distinct Great Seal for Ireland (x). And the right in a Patent for one Country is confined to that, and will not enable the Party to bring the Article for Sale into the other (y).

There must be separate Bills upon distinct invasions of a Patent (z).

III. *Injunctions to stay Waste* are very frequently applied for in Chancery, and have, in practice, superseded the preventive common-Law remedy by *Writ of Estrepement*, and the additional remedy by means of that Writ given by the stat. of Gloucester (a). And a mere *threat* to commit Waste is sufficient to ground an Injunction upon; it not being necessary for the Party to wait till the Waste is actually committed (b); but there must be some act done, or threat made, on which to ground the Injunction, not mere belief of Waste intended (c). Where the *Title is doubtful* (d), *or *disputed*, as between Devisee and Heir at [*139 Law (e), or otherwise (f), an Injunction will not be granted. But in general, it seems, it may be obtained to stay Waste, on the part of a Person or Persons, (even of a child in *ventre sa mere*) (g), having the next immediate *vested Estate of Inheritance* in the subject matter of the waste. Trustees to preserve Contingent Remainders, may, before the Contingent Remainder-man comes in esse, obtain an Injunction to stay Waste (h).

An Injunction may also be obtained by Persons entitled to *contingent* (i) and *executory Estates* (k) of Inheritance, against Tenant by the *Curtesy* (l), in *Dower*, or as *Guardian* (m), or as *Jointress*, who is Tenant for life (n), or against him who has a legal Estate of Inheritance, but being a *Trustee* is not liable to an Action of Waste (o), to inhibit them from committing Waste on Houses, Lands, or Woods, by *defacing or pulling [*140 down Buildings, digging Mines, or felling Timber (p).

(x) 6 Ves. 718.

(y) Ibid.

(z) Dilly v. Doig, 2 Ves. jun. 487.

(a) See as to this Writ, Fitz. Nat. Bre. 139, &c. edit. 1730.

(b) Gibson v. Smith, 2 Atk. 183. S. C. Barn. 491.

(c) See Hanson v. Gardiner, 7 Ves. 310.

(d) Field v. Jackson, 2 Dick. 591.

(e) Smith v. Collyer, 6 Ves. 89. See also Norway v. Rowe, 19 Ves. 154, 5; and see Jones v. Jones, 3 Meriv. 173. In this case Sir Wm. Grant, M. R. observed, "I own I cannot see a very good reason why the Court, which interferes for the preservation of personal property, pending a suit in the Ecclesiastical Court, should not interpose to preserve real property, pending a suit concerning the validity of a devise."

(f) Anonymous, 6 Ves. 51.

(g) Robinson v. Litton, 3 Atk. 211. 2

Vern. 711. 1 Ves. 555. Pre. Chan. 50. Barn. 274.

(h) Garth v. Cotton, 3 Atk. 754. S. C. 1 Ves. 524, 546, and also S. C. 1 Dick. 183, where Lord Hardwicke's Judgment is given from his own notes.

(i) Williams v. Duke of Bolton, 3 P. Wms. 268, in note 1.

(k) See Hayward v. Stillingfleet, 1 Atk. 425; and see Perrot v. Perrot, 3 Atk. 95. Robinson v. Litton, 3 Atk. 209, 11. Fearn on Executory Devises, p. 536. 4th Edit.

(l) Hardr. 96.

(m) Clarke and Thorpe, 2 Ves. 233.

(n) Nels. 190, 220. 1 Ves. 264.

(o) Tothill 37, 38. 2 Ch. Ca. 32.

(p) Oak and Ash are Timber every where by the general rule of the Realm, when of 20 years growth; and Beech of 20 years growth is recognised by our Law Books as a Timber Tree by the custom of the county of Bucks. Au-

An Injunction may also be obtained in respect of Equitable Waste, against a Tenant in Tail after possibility of Issue extinct, (q); and against a Tenant for Life without impeachment of Waste, taking the produce of Mines *unopened* (r), (unless they be new Pits or Shafts for the working an old vein of Coals (s), or committing malicious and extravagant Waste (t): the *141] clause, "*without impeachment of Waste*," never *being extended to allow the very destruction of the Estate itself, but only to excuse from *permissive Waste* (u).

By the *Common Law*, the clause "*without impeachment of Waste*," only exempted a Tenant for Life from the penalty of the Statute, the recovery of treble value, and the place wasted; but did not give the *property* of the thing wasted. In *Lewis Bowles's Case* (x) it was first determined that these words also gave the *property*: the necessary consequence of which decision was, that in general, and unless under particular circumstances, he was not to be restrained in Equity (y). But Courts of Equity have restrained his power greatly, in comparison of what it was formerly (z); and in *Lord Barnard's Case*, (the strongest that could happen,) *Lord Couper* restrained the Tenant for Life from pulling down *Raby Castle* (a); nor was that an original Case without precedent or judicial opinion to support it as appears from a Decision, 5 Jac. 1 (b). Afterwards, the Court proceeded still farther, and restrained a Tenant for life from cutting down timber, either for the *ornament* or *shelter* of the House (c),

brey v. Fisher, 10 East 455. When once a particular wood has been determined to be Timber by the custom of a country, it is to be taken to be so according to the rules of the common law in respect to Timber in general. Ibid. 459. What is Timber must be determined by the custom of the country. By custom, some trees are considered as Timber, which in their nature, generally speaking, are not so, as Horse-Chestnut and Lime Trees, Birch, Beech, Asp, and Walnut Trees. *Duke of Chandos v. Talbot*, 2 P. Wms. 606. Pollards, it seems, are considered as Timber, if the Bodies of them be sound and good; *ibid.* over-ruling what is said in *Toby v. Molyns*, Plowd. 470. The right to Timber belongs to those who at the time of its being severed from the Freehold, whether by the act of God, as by Tempest, or by a Trespasser and by wrong, have the first Estate of Inheritance, whether in Fee or in Tail, and they may bring Trover for it. *Bowles's case*, 11 Co. 79. See *Whitfield v. Bewit*, 2 P. Wms. 240; and S. C. 3 P. Wms. 268; see also *Harg. and Butl. Co. Litt.* 218 b. n. 2. *Pyne v. Dor*, 1 T. R. 55. And where the Tenant for

Life has also in himself the next existent Estate of Inheritance, subject to intermediate contingent remainders, he shall not take advantage of his own wrong in cutting down Timber, but the Court will preserve it for the benefit of the contingent remainder-men. *Williams v. Duke of Bolton*, mentioned 3 P. Wms. 268, in note 1.

(q) *Abrahall v. Bubb*, 2 Freem. 53. 279. *Williams v. Day*, 2 Cha. Ca. 32. *Williams and Williams*, 15 Ves. 419.

(r) *Co. Litt.* 53 b. *Tracey against Hereford*, 2 Bro. C. C. 123. *Whitfield v. Bewit*, 2 P. Wms. 242; but see 1 Salk. 161.

(s) *Clavering v. Clavering*, 2 P. Wms. 388. S. C. Sel. Cas. 79.

(t) 2 Freeman, 52. 2 Cha. Ca. 32.

(u) *Prec. in Cha.* 454. — *v. Copley*, M8. 2 Cha. Cas. 32.

(x) 11 Co. 79; but see 3 Atk. 215.

(y) *Alston v. Alston*, 2 Ves. 265, 266.

(z) 3 Atk. 215.

(a) *Vane v. Lord Barnard*, 2 Vern. 738. S. C. *Prec. Ch.* 454.

(b) Mentioned 1 Ves. 265; and see also what Lord Nottingham says in *Abraham v. Bubb*, 2 Freem. 53.

(c) *Packer v. Lord Bollingbroke*, Dom.

and from cutting down Trees in *lines*, or *avenues*, or *ridings* in a Park (*d*), and likewise *from cutting down Trees not of [*142 a proper growth to be cut, and even from cutting decayed Timber (*e*) ; or cutting so much Timber as not to leave enough for Repairs (*f*). But subject to the doctrine as to *Equitable Waste*, (a doctrine not to be extended) (*g*), a Tenant for Life unimpeachable for Waste is at liberty to cut Timber generally, treating it in a Husbandlike manner, independent of the effect upon the beauty of the Place (*h*) : there being no such Law in this Country, as that made by a King of France, (Philip la Belle) in the fourteenth Century, which rendered it penal to cut a Tree, *qui a este garde pour sa beaute*.

A Tenant for Life cannot cut down Trees for repairs and sell the same, the sale being waste (*i*) ; and where a Tenant for Life, punishable for waste, with power under an inclosing Act to mortgage for the expense of the Inclosure, felled Timber, and applied the produce instead, he was decreed to account to the Owner of the first Estate of Inheritance (*k*).

If a Tenant for Life under a Will is directed to keep buildings in Tenantable repair, an Injunction may be obtained against permissive waste (*l*).

It is not Waste to cut Timber where necessary for *the [*143 growth of the underwood in which it is situated (*m*) ; neither is it Waste to cut Timber merely ornamental, unless it *was planted and growing for ornament, such as Vistas and Avenues* (*n*). This principle, however, does not, it seems, extend to a Wood covering thirty Acres (*o*) ; but it operates to prevent the cutting down of Trees planted for the purpose of *excluding objects from view* (*p*).

As the Court cannot determine what is ornamental Timber, it being merely a matter of Taste, they therefore say, that what *was planted for ornament* must be considered as ornamental (*q*). Where, therefore, a Testator, or Author of Deed creating a Tenancy for Life, has planted for ornament, though his taste be very disgusting, yet the taste of a Testator, like his Will, is bind-

Proc. March 1723. Lord Blaney v. Mahon, Dom. Proc. 27 March 1723. Packington v. Packington, 3 Atk. 215. 1 Cha. Cas. 166.

(*d*) Aston v. Aston 1 Ves. 264. O'Brien v. O'Brien, Amb. 107.—Strathmore v. Bowes, 2 Bro. C. C. 88.

(*e*) Perrot v. Perrot, 3 Atk. 95. As to whom decayed Timber belongs, see Whitfield v. Bewitt, 3 P. Wms. 268. From this case it appears the Court will, it seems, on a bill filed by a remainderman, entitled to the inheritance, order it to be cut down and sold, and the money laid out for the benefit of those in remainder.

(*f*) 1 Ves. 264.

(*g*) 16 Ves. 185.

(*h*) Ibid. 185.

(*i*) Co. Litt. 53 b. Gower v. Eyre, Coop. 161.

(*k*) Lee v. Alston, 3 Bro. C. C. 37. 1 Ves. jun. 78. Gower v. Eyre, Coop. 161.

(*l*) Caldwell v. Baylis, 2 Meriv. 408.

(*m*) Burgess v. Lamb, 16 Ves. 179. and Knight v. Duplessis, 2 Ves. Sen. 361.

(*n*) Burgess v. Lamb, 16 Ves. 133.

(*o*) Ibid. 185.

(*p*) Day and Merry, 16 Ves. 375.

(*q*) Lord Mohun v. Lord Stanhope, Rolls, 9 March 1806, MS.

ing, and the Court will not permit a Tenant for Life to destroy Plantations so intended for ornament. The principle, as before observed, has been extended from ornaments of the House to Outhouses, and Grounds, and to Plantations, Vistas, Avenues, and to all the Rides about the estate for ten miles round : but it is not a sufficient ground for an Injunction that the Trees are ornamental, not to the Estate upon which they grow, but to the surrounding Country. If the Court has any doubt whether Trees were planted for ornament, it will direct an Issue, taking care at the same time, that if in the result of such a direction *144] the Defendant *should be prejudiced by not being permitted to cut in the mean time, the Plaintiff shall undertake to pay the value if the decision should be against him (r).

If a Tempest has produced Gaps in a piece of ornamental planting, by which unequal and discordant breaks and divisions are occasioned, cutting a few Trees to produce an uniform and consistent, instead of an unpleasant and disjointed, appearance, would not be construed Waste (s). A Tenant for Life, it seems, cannot cut down Trees he has himself planted for ornament, but he may thin such Trees (t).

An injunction may be obtained where there is Tenant for Life, subject to Waste, remainder for Life dispunishable for Waste, remainder in fee ; for the Court will not suffer an agreement between the two Tenants for Life to commit Waste, to take place against a Remainder-man before the time comes when the power of the second Tenant for Life commences (u). So where A. is tenant for years, remainder to B. for Life, Remainder to C. in fee, and A. is doing Waste ; B. though he cannot, not having the Inheritance, bring an *Action* for Waste (x), is entitled to an Injunction (y) ; (1) though not to an Account, for to that the owner of the Inheritance is alone entitled (z). But if the Waste be of a trivial nature, and *a fortiori*, if it be what is *145] termed *meliorating* *Waste, as by building on the Premises (a), the Court will not enjoin ; nor will it, in any case, unless the Reversioner or Remainder-man in fee be made a party ; for they, possibly, may approve of the Waste (b). So, an Injunction against Waste is obtainable against a Mortgagor (c), (2) or

(r) See *Marquis of Downshire v. Lady Sandys*, 6 Ves. 110.

(s) *Lord Mohun v. Lord Stanhope*, Rolls, 9 March 1808, MS.

(t) ——— v. Copley, Cor. Lord Chancellor Erskine, MS.

(u) *Robinson v. Litton*, 3 Atk. 210 ; and see *Garth v. Cotton*, 3 Atk. 755, and the cases there mentioned by Lord Hardwicke.

(x) See *Pigott v. Bullock*, 3 Bro. C. C. 544.

(y) *Mollineux v. Powell*, 3 P. Wms. 268, note F. 1 Roll Abr. *Rosewell's Case*, 377.

(z) 3 Bro. C. C. 544. *Rolt v. Somerville*, 2 Eq. Abr. 759.

(a) 1 Inst. 53.

(b) 3 P. Wms. 268, n. F.

(c) 3 Atk. 723, and *Usborne v. Usborne* 1 Dick. 75, and the several cases there mentioned. *Cooper v. Seymour*, 22 Geo. 2 MS.

(1) Vide *Kane v. Vanderburgh*, 1 Johns. Ch. Rep. 11.

(2) Vide *Brady v. Waldron*, 2 Johns. Ch. Rep. 148.

a Mortgagee in Fee (*d*), or for years (*e*); but if a Mortgagor cut Wood and Underwood at seasonable times, and of proper growth, it will not be considered as Waste (*f*). An Injunction lies also against a Lessee for Years (*g*), or under Lessee (*h*) or Tenant from year to year (*i*), manifesting an intention of committing Waste; and by a Landlord or Termor at a ground Rent against his Lessee (*k*); but upon a Lease of Land in *Ireland* for Lives, renewable for ever, the Courts of Equity there, have declined restraining Waste not specially provided for by the terms of the Lease (*l*). Where a Purchaser has filed a Bill for a specific performance of his contract, suggesting that the Defendant is proceeding to commit Waste, an Injunction will be granted if the Contract is admitted (*m*).

*With respect to Lessees, if they cut down growing [*146 Timber (*n*), or are about to injure Fish Ponds (*o*), or neglect to keep the bank of a River on which the demised Lands are situated, in repair, an Injunction, it seems, will be granted (*p*); and where a Lessee covenants not to convert pasture Lands into Arable; or, what is equivalent, to manage pasture in an husbandlike manner, he may be restrained from the violation of such covenant (*q*); but the Court, except in respect of the Covenant, would not grant an Injunction, unless it were ancient meadow (*r*).

An Injunction is never granted *against* a Person having the *Inheritance*, unless he is only a Trustee, or in such like special Case (*s*). A Tenant in Tail, therefore, may commit Waste in Houses as well as on all other parts of the Estate, notwithstanding any restraint to the contrary (*t*). Even where an Infant, Tenant in Tail, not likely to live till of age, by his Guardian, cut down a great quantity of Timber, an Injunction was refused, on behalf of a Remainder-man, to restrain him (*u*).

An Injunction is obtainable, on a Bill filed by the Patron of a Living, to restrain a Rector committing Waste on the Glebe (*x*),

(*d*) Farrant against Lee, Ambl. 105; and see Robinson v. Litton, 3 Atk. 210.

(*e*) 3 Atk. 723.

(*f*) Hampton v. Hodges, 8 Ves. 105.

(*g*) 4 Roll's Abr. 380. Bishop of London v. Webb, 1 P. Wms. 527; and see Lord Courtown v. Ward 1 Sch. & Lefr. p. 8. Pratt v. Brett, 2 Madd. Rep. 62.

(*h*) Farrant v. Lovell, 3 Atk. 723. Ambl. 105.

(*i*) Onslow v. —, 16 Ves. 173.

(*k*) Farrant v. Lee, Ambl. 105. 3 Atk. 723; and see 1 P. Wms. 527, the case of a Bishop's Lessee.

(*l*) 1 Sch. Lefr. & 561. Redesd. Tr. Pl. 113.

(*m*) Norway v. Rowe, 19 Ves. 151. 155.

(*n*) Redesd. Tr. Pl. 111, 3d Edit.

(*o*) 2 Bro. C. C. 64. Lord Bathurst v. Burdon.

(*p*) Lord Kilmorey v. Thackeray, cit. 2 Bro. C. C. 65.

(*q*) Drury v. Molins, 6 Ves. 328; and see 3 Anstr. 750.

(*r*) Lork Grey de Wilton v. Saxon, 6 Ves. 106.

(*s*) Prac. Regr.

(*t*) Sic dict. in Grenorchy v. Bosville, For. 16.

(*u*) Mr. Saville's case, mentioned For. 16.

(*x*) Knight v. Moseley, Amb. 176. recognised by the Lord Chancellor in Wither v. Dean, &c. of Winchester, 3 Meriv. 427. Bradley v. Strachy, 3 Barn. 399. 2 Atk. 217. Hoskins v. Featherstone, 2 Bro. C. C. 552.

*147] or cutting Timber in the *Church-yard, except for repairing the Parsonage House, Outhouses, Chancels or Pews (y); it lies also to restrain the Widow of a Rector committing Waste (z). A Rector may cut Timber; and he is also entitled to Botes, for repairing Barns and Outhouses belonging to the Parsonage: but he may not cut down Timber for any common purpose. If, however, it is the custom of the country, he may cut down *underwood* for any purpose; but if he grubs it up it is Waste. An Injunction may be obtained, at the instance of the Attorney-General, against a Bishop, to restrain the felling of great quantities of Timber (a).

Formerly, in a case of Trespass, unless it grew to a nuisance, an Injunction would have been refused (b); but, in modern cases, an Injunction to stay Waste has been granted in cases of Trespass, (unless where the Title is disputed) (c), as where a person having got possession under articles to purchase, cuts Timber (d). So, the Owner of a Mine working Minerals *148] *in the adjoining Land of another, though a mere trespass, under colour of a right, has been restrained (d); but where the Defendant being a mere Stranger, and guilty of a forcible Entry, may be turned out of possession immediately, an Injunction does not lie (e). (1)

If the Lord of a Manor is preparing to open Mines (f), or,

(y) *Strachy v. Francis*, 2 Atk. 216.

(z) *Hoskins against Featherstone*, 2 Bro. C. C. 552.

(a) *Knight against Moseley*, Amb. 176; and see *Jefferson v. Bishop of Durham*, 1 Bos. & Pull. 120.

(b) See *Hanson v. Gardiner*, 7 Ves. 307. *Mogg v. Mogg*, 2 Dick. 670.

(c) *Norway v. Rowe*, 19 Ves. 147. In *Kinder v. Jones*, 17 Ves. 110. a doubt was expressed by the Lord Chancellor, but an Injunction was granted afterwards by the Master of the Rolls, the defendants though served with notice, not appearing.

(d) *Crockford v. Alexander*, 15 Ves. p. 133. *Rawlins v. Burgis*, 2 Ves. & Bea. 387; and see also *Mitchell v. Dora*, 6 Ves. 147. *Hanson v. Gardiner*, 7

Ves. 308. *Courthope and Mapplesdan*, 10 Ves. 290. In some of these cases the Chancellor seemed not very clear whether an Injunction should be granted in a case of mere trespass; see *Rosedale Tr. Pl.* 111. 3d Edit. but see *Hughes v. Trustees of Morden College*, 1 Ves. 189. 8 Ves. 90. and 9 Ves. 291; *Twort v. Twort*, 16 Ves. 130. S. C. MS. *Smith and Collyer*, 18 Ves. 90. *Earl Cowper v. Baker*, 17 Ves. 128, and *Thomas v. Oakley*, 18 Ves. 184.

(d) *Mitchell v. Dora*, 6 Ves. 147.

(e) *Mortimer v. Cottrell*, 2 Cox, 205.

(f) *Grey v. Duke of Northumberland*, 13 Ves. 236. S. C. 17 Ves. 281. That the Lord cannot dig for Mines, see *Gilb. Ten.* 327.

(1) In a case of mere trespass, and where the injury is not irreparable, and destructive of the estate, but is susceptible of a pecuniary compensation, and for which, adequate damages may be obtained in the ordinary course of law, an injunction will not be granted. It must be a strong and peculiar case of trespass, going to the destruction of the inheritance, and incapable of remedy at law, which will induce a court of chancery to interfere. *Jerome v. Ross*, 7 Johns. Ch. Rep. 315. Vide *Stevens v. Beekman*, 1 Johns. Ch. Rep. 318. *Livingston v. Livingston*, 6 Johns. Ch. Rep. 497. *Shubrick v. Guerard*, 2 Des. 616. and note, 619. But where the injury would be irreparable, and to prevent a multiplicity of suits, an injunction may be granted to prevent a trespass: As where the defendant claimed the right to *collovers* in the plaintiff's land, and the plaintiff's right had been established by one decision at law, and other suits were pending on the same question. *Livingston v. Livingston*, *ut supra*.

(unwarranted by custom) to cut Timber, on the Copyhold Land, an Injunction will be granted (g). The Lord of a Manor, it has been held, is confined to his legal remedy for Waste committed by a Copyholder, and has no Equity for an Injunction (h), but this decision, in a subsequent case, was overruled (i).

An Injunction between Tenants in Common against *malicious Destruction*, may be obtained, but not against what is called *equitable Waste* (k), unless the Tenant committing such Waste is insolvent (l); or is occupying Tenant to the Plaintiff (m); but except under such circumstances, an Injunction, it seems, cannot be obtained between Tenants in Common (n).

In the case of *Coparceners*, the Court has interfered by Injunction to prevent the destruction of *the Property by [*149 one Coparcener to the injury of the rest (n) (1).

The Court, as hath been observed, interferes by way of Injunction in case of Waste, with a view to the *prevention of the Wrong*; and where a Bill is filed for an Injunction to stay Waste, and Waste has been already committed, the Court, to prevent multiplicity of Suits, will not oblige the Party to bring an Action at Law, but will decree an account and satisfaction for what is passed (o): (2) but after the *determination* of a Tenant's Estate by assignment or otherwise, a Bill will not lie for an account of Timber cut down (p), no Injunction being prayed, or necessary, no injury to be prevented. If, indeed, a person commits Waste, and continues in Possession, there an Injunction to stay Waste is proper (q), from the probability that he will again commit Waste.

Where there is an arrear of a charge upon a Real Estate an Injunction lies to prevent the cutting of Timber upon it (r) (3.)

(g) *Whitechurch v. Helwerthy*, 19 Ves. 213.

(h) *Dench v. Bampton*, 4 Ves. 700; and see *Redesd. Tr. Pl. 113*.

(i) *Richards v. Noble*, 9 March 1807, MS. S. C. 3 Meriv. 656.

(k) *Hole v. Thomas*, 7 Ves. 589.

(l) *Smallman v. Onions and others*, 3 Bro. 621.

(m) *Twort v. Twort*, 16 Ves. 132. S. C. MS.

(n) *Goodwyn v. Spray*, 2 Dick. 667.

(n) *Redesd. Tr. Pl. 113*, 3d edit.

(o) *Jesus College v. Bloom*, 3 Atk. 262, 3 S. C. Ambl. 54.

(p) *Ibid.* 264; and see *Smith v. Cooke*, 3 Atk. 381; and *Turner v. Buck*, 2 Eq. Cas. Abr. 758.

(q) 3 Atk. 381.

(r) *Lord Blaney v. Mohun*, Vin. Abr. tit. "Waste," (R. a.) case 27. 2 Eq. Cases Abr. 758.

(1) It has been held also, where one tenant in common is in possession of the whole land, that an injunction may issue against him, to restrain the cutting of timber growing on the premises, and which is not needed for the necessary use of the farm. *Hawley v. Clowes*, 2 Johns. Ch. Rep. 122.

(2) An injunction will not be granted to prevent the tenant from removing timber already cut down, unless under very special circumstances: In ordinary cases, the Court will interfere only to prevent the commission of future waste. *Watson v. Hunter*, 5 Johns. Ch. Rep. 168.

(3) An injunction may be granted to stay waste, though there be no suit pending, and though no action can be maintained, at law, against the tenant. *Kens v. Fenderburgh*, 1 Johns. Ch. Rep. 11.

A mortgagor, who has assigned his equity of redemption, cannot have an in-

IV. *The Sale of Books, printed Music, or Prints, &c.* will be restrained by Injunction, if a proper ground be laid for such proceeding.

If, however, a Publication be of such a nature that the Author can maintain no Action at Law, a Court of Equity will not grant an Injunction, even upon a submission in the Answer: "the *150] Court," for instance, **"will not,"* says Lord Eldon, "give an account of the *unhallowed profits of libellous Publications*" (s).

Where the right of printing and selling a Work is grounded on an act of Parliament, it is not necessary to establish the right at Law previous to filing a Bill (t); but if the claim to the Copyright depends upon the effect of an Agreement, the Court will not grant an Injunction against an invasion of the Copyright, until a recovery in an Action (u).

The Principle on which the Court grants Injunctions to restrain the Sale of Books, is, that damages do not give adequate relief; and that the Sale of Copies by the Defendant is, in each instance, not only taking away the Profit upon the individual book, which the Plaintiff probably would have sold, but may injure him to an incalculable extent, which no Inquiry for the purpose of damages can ascertain (x). But wherever a fair doubt appears as to the Plaintiff's legal right, the Court always directs it to be tried, and only permits the Sale, on an undertaking to account according to the result of the Action (y). Indeed, it is frequently, if not constantly, prayed by the Bill in these cases, that the right, if disputed, and capable of Trial in a Court of common Law, may be there tried and determined under the direction of the Court of Equity; the final object of the Bill being a perpetual Injunction to restrain the infringement of the right claimed by the Plaintiff (z).

*151] *An Injunction until Answer, or further order has been granted, to restrain the publication of a Work as the Plaintiff's, upon Affidavit by the Plaintiff's agents (the Plaintiff himself being abroad) of circumstances making it highly probable that it was not the Plaintiff's Work; and the Defendant refusing to swear as to his belief that it was so (a).

(s) *Wolcott v. Walker*, 7 Ves. 1. In *Southey v. Sherwood*, 2 Meriv. 437. Lord Eldon confirmed that case.

(t) 1 Ves. 476.

(u) *Wolcott v. Walker*, 7 Ves. 1.

(x) *Hogg v. Kirby*, 8 Ves. 225; and

see *Wilkins v. Aikin*, 17 Ves. 424.

(y) See *Wilkins v. Aikin*, 17 Ves. 422.

(z) *Redesd. Tr. Pl.* 112, 3d edit.

(a) *Byron v. Johnston*, 2 Meriv. 29.

junction to stay waste, against his vendee. *Bramley v. Fanning*, 1 Johns. Ch. Rep. 501.

An injunction to stay waste will not be granted, where the right is doubtful, or where the defendant is in possession, claiming adversely, and an ejectment brought by the plaintiff, is pending and undetermined. *Storm v. Mann*, 4 Johns. Ch. Rep. 21.

Where a Person was exclusively appointed by the House of Lords to print a Trial before that House, and another printed and sold the Trial, an Injunction to restrain the Sale until Answer, was granted (b).

The Proprietor of a copyright must file *separate Bills* against each Bookseller taking copies of a spurious Edition for Sale. If a Defendant transfers his Books to another, that person, it seems, may be made a Party (c).

Most of the cases where an Injunction has been sought to restrain the Sale of Books, have been where, under colour of a new work, the old work has been republished, and copies multiplied; but an Injunction has, on the same principle, been applied to restrain the Sale of a Work, which, though not the same, *has been represented as the same* (d).

A Collection of *Letters*, as well as other Books, is within the intention of the 8th of Queen Anne, c. 19, the Act for the encouragement of Learning (e); and an Injunction has been granted to restrain the Executor of the Person to whom private Letters were written, from publishing them without the leave of the Executors of the Person who wrote them (f); [*152 but every private Letter upon any subject to any person is not to be considered as a literary work to be protected upon the principle of Copyright. Letters in the prosecution of commercial or other business could not be considered as a literary work, in which the writers have a Copyright. Whether a correspondence between Friends and Relations in confidence, upon private concerns, falling into the hands of Executors, Assignees of Bankrupts, &c. could be restrained by an Injunction from being made public in a way that might be injurious to the feelings of Individuals, may be doubted, unless they were the subject of contract or property; but where the Plaintiff held out the Defendant to the Public as a person giving false intelligence, and never authorized by the Plaintiff to make such communications, and the Letters from the Plaintiff were denied, to the Defendant's belief, to be written in confidence, the Defendant was allowed, for the purpose of clearing himself, and showing that his intelligence was derived from the Plaintiff, to print her Letters (g).

Injunctions, also, have been granted, to restrain the publication of *Law Precedents* and *Reports*, and other MS. works (h) and of *Translations* (i) surreptitiously procured (k); and the

(b) Gurney v. Longman, 13 Ves. 493. S. C. MS.

(c) Dilly v. Daig, 2 Ves. jun. 486.

(d) 8 Ves. 215.

(e) Pope v. Curl, 2 Atk. 341.

(f) Thompson v. Stanhope, Ambl. 737. Earl of Granard v. Dunkin, 1 Ball & Beatty 207.

(g) Lord and Lady Percival v. Phipps,

2 Ves. & Bea. 27, 28.

(h) Duke of Queensbury v. Shebbare, 2 Eden. 329. Southey v. Sherwood, 2 Meriv. 435.

(i) Wyatt v. Barnard, 3 Ves. & Bea. p. 77. Burnett v. Chetwood, 2 Meriv. 441.

(k) See cases of Mr. Webb and Mr. Forrester, mentioned Ambl. 684.

*153] publication of a Play taken in *shorthand from the mouth of the Performers, has been restrained (l). If a Person, by an extraordinary effort of memory, could remember so as to publish a play, *Lord Eldon* intimated he might legally do so (m).

It is competent to any person to make a *Map*, a *Road Book*, a *Selection from Authors*, a *Court Calendar*, &c. such subjects being open to all the World ; and in these cases different persons might publish their collections, though the articles might happen to be the same ; but a person will not be permitted to copy the original Work of another (n). Nor is it allowable, under the pretence of *Quotation*, to publish either the whole or part of another's Work, though he may use, what it is in all cases very difficult to define, *fair Quotation* (o).

The invasion of another's Work is generally made evident to the Court by the similarity of the inaccuracies (p), which could only proceed from unguarded plagiarism.

An *Abstract* (q), or *fair Abridgment* of a Work, is allowable (r) ; but a *colorable Abridgment* is not (s).

In regard to *Engravings*, it has been determined that, the Act (8 Geo. II. ch. 13,) is not merely confined to works of In-*154] tention, but means the designing *or engraving any thing that is already in nature (t). It has been helden, also, that it is no answer to an application for an Injunction that the Prints are in any other work, unless they are represented in the same manner and form (u).

V. If *Negotiable Securities*, such as Notes, or Bills, are affected by Fraud, and are, *before they are due*, endorsed in a mercantile manner (x), the Endorsee, for the sake of commerce, will not be affected by the Fraud, and therefore the negotiation of them may be restrained by Injunction, immediately on the filing of the Bill, supported by an affidavit of the truth of the fraudulent circumstances stated in the Bill, lest the defendant should, upon intimation of the suit, by negotiating the Security, defeat its object (y). If Notes or Bills are assigned *after they are due*, the Assignee takes them subject to all the Equities to which they were liable, before they were so assigned. A Bond or Covenant fraudulently obtained, though assigned to a third

(l) *Macklin* against *Richardson*, Ambl. 694.

(m) *Morris v. Harris*, Dec. 12th 1814. MS.

(n) See *Longman v. Winchester*, 16 Ves. 289; and see *Matthewson v. Stockdale*, 12 Ves. 270, and *Wilkins v. Aikin*, 17 Ves. 425. *Carnan v. Bowles*, 1 Cox 283. S. C. 2 Bro. C. C. 80.

(o) *Wilkins v. Aikin*, 17 Ves. 424.

(p) *Carnan* against *Bowles*, 2 Bro. C. C. 84; but see *Cary v. Paden*, 5 Ves. 24.

(q) *Dodsley* against *Kinnersley*, Ambl. 403; and see *Macklin* against *Richardson*, Ambl. 696.

(r) *Gyles v. Wilcox*, 2 Atk. 143. S. C. Barn. 368. *Bell* against *Walker*, 1 Bro. C. C. 451.

(s) *Butterworth v. Robinson*, 5 Ves. 709. 2 Atk. 143.

(t) *Blackwell v. Harper*, 2 Atk. 92. S. C. Barn. 210.

(u) 2 Atk. 95.

(x) *Lex Prætoria*, MS.

(y) See 1 Fombl. Eq. 43, in note.

person for a valuable consideration, without notice, remains, nevertheless, impeachable for fraud; for he has no remedy at Law, or right to sue in his own name, and has only an equitable remedy, which fails when the Bond is obtained by Fraud (s): so that an Injunction to restrain an Assignment in such cases, is, in general, unnecessary. (1)

A *Transfer of Stock* will in many instances be restrained; as where there are opposite claims under different Wills (a), and in other cases where Bills **Quia timet*, are filed, of which [*155 mention will presently be made. In one case, an Injunction was obtained to restrain a transfer of Stock standing in the name of a *Steward*, on strong evidence, by affidavit that it was the produce of his master's Property; but an Injunction was refused as to Money of the *Steward* in the Banker's hands (b).

VI. Injunctions to stay *Nuisances*, will, under circumstances, be granted, but they will be extended only to such as are *Nuisances at Law*: the fears of mankind, though they may be reasonable ones, will not create a nuisance.

Nuisances are private or public: a private Nuisance is that which affects only particular persons, as in stopping up ancient lights, &c.; a public Nuisance is such as affects many persons, though at the same time, it may likewise be of a private nature too, as in the case of a hole in the King's Highway, &c.

In the case of *public Nuisances*, an Information may be filed in the name of the Attorney-General (c); and it is for his consideration whether it shall be filed or not (d); and of late, the Attorney-General has required a case to be laid before him, previous to giving his consent that an Information be filed in his name (e).

Where old Houses in London were converted to a **pur-* [*156 pose that made them dangerous to the Public, Lord Rosslyn granted an Injunction (f).

What is a Nuisance, considered with reference to carrying on a Trade, is not easy to determine. "I have," says Lord Eldon "frequently known Verdicts deciding Manufactories to

(s) *Lex Prætoria*, MS.

(a) 6 Ves. 172.

(b) *Lord Chedworth v. Edwards*, 8 Ves. p. 46; but in a subsequent case, *Cox and others v. Paxton*, MS. Lord Eldon said he had consulted with Lord Ellenborough, and thought he had gone too far.

(c) Anon. 753. S. C. See *Barnes v.*

Baker, Ambl. 158.

(d) *Ibid.* 159. As to obscuring ancient Lights, see *Attorney-General v. Nichol*, 16 Ves. 338.

(e) See what is said Ang. in *Attorney-General v. Heath*, 18 Ves. 214.

(f) *Mayor, &c. of London v. Bolt*, 5 Ves. 129.

(1) A court of chancery will not, by injunction, restrain the promisee of a negotiable note from assigning it, where the consideration is illegal; as where a note was given to secure the purchase money, on the sale of a pretended title to lands; but the parties being in *pari delicto*, will be left to pursue their remedies, if any, at law. *Woodworth v. Jones*, on appeal, 2 Johns. Cas. 417.

be no Nuisance, by which it cannot be denied the whole comfort of life is destroyed, and health must, in some degree, be affected. I recollect the instance of a Sugar House ; and a Brewhouse is, within my own knowledge, perhaps not legally, but in common parlance, a great Nuisance" (g). Injunctions in such cases are cautiously granted, and not *ex parte*. The Manufacture of Bricks is not considered as a Nuisance (h).

On Informations by the Attorney-General on behalf of the Crown, the Court of Exchequer has abated Nuisances injurious to the Royal Prerogative, such as Nuisances in Harbours. If a trespass is made on the Soil of the Crown, whether reserved for the private use of the Sovereign, or for public purposes, and the trespass does not produce a public injury, the Jurisdiction may be founded on the right of the Crown to have the Land arrented, and the profit accounted for as part of the royal revenue, in the nature of an assart ; and if the trespass produces, or may in its consequences produce, public injury, the Crown is entitled to the most effectual way of preventing the injury (i).

*157] In the case of a *private Nuisance* (k), or of a **public Nuisance*, it seems necessary that a Judgment at Law ascertaining the rights of the Parties should be obtained previous to an Injunction (l).

A Nuisance respecting lights is not such merely because the Plaintiff's lights are altered ; for then no vacant piece of ground could be built upon in London ; but the Law says it must be so near as to be a nuisance. Seventeen feet distance, for instance, will not constitute a nuisance. The loss of a Prospect is not considered as a nuisance (m).

An Injunction will not, on motion, be granted to pull down blinds obstructing the Plaintiff's lights, no order ever being made, on *motion*, to pull down any thing, though it is sometimes, and but rarely, done on a decree ; but the Chancellor will, by consent, put the matter in a way of Trial at Law, and order scaffolding to be pulled down. and enjoin the party from building or erecting, whereby any of the Plaintiff's Lights may be obstructed, till after Trial had (n). (1)

(g) Attorney-General v. Cleaver, 18 Ves. 217.

(h) Duke of Grafton v. Hilliard, mentioned by Lord Eldon in Attorney-General v. Cleaver, 18 Ves. 219.

(i) Redesd. Tr. Pl. 117, and see what is said in Attorney-General v. Cleaver, 18 Ves. 218.

(k) Coutson v. White, 3 Atk. 21.

(l) Attorney-General v. Cleaver, 18 Ves. 211.

(m) Fishmonger's Company against East India House, 1 Dick. 165.

(n) Ryder v. Bentham, 1 Ves. 543. S. C. 1 Dick. 277, where the order is more particularly stated ; and see Morris v. Lessees of Lord Berkley, 2 Ves. 452.

(1) A court of chancery has concurrent jurisdiction with the courts of law, in case of a private nuisance, by obstructing an ancient water-course ; and may grant an injunction to restrain the party trespassing, though the plaintiff has not established his title at law. *Gardner v. Trustees of Newburgh*, 2 Johns. Ch. Rep. 162. Vide *Newburgh Turnpike Company v. Miller*, 5 Johns. Ch. Rep. 101.

VII. Miscellaneous Cases in which an Injunction has been granted.

If an Ejectment is brought to try a right to Land in a Court of common Law, a Court of Equity will restrain the Party in possession from setting up any title which may prevent the fair Trial of that right ; *as a term for years, or other Interest, in a [*158 Trustee, Lessee, or Mortgagee. But this will not be done in every case ; for as the Court proceeds upon the principle that the Party in possession ought not in conscience to use an accidental advantage to protect his possession against a real right in his adversary, if there is any circumstance which meets the reasoning upon this principle, the Court will not interfere. Therefore, if the Possessor is a Purchaser for a valuable consideration, without notice of the Title of the Claimant, this is a Title in conscience equal to that of the Claimant, and the Court will not restrain him from using any advantage he may be able to gain to defend his possession. (o).

Where the Defendant had a piece of Water supplied by the same stream from which a Mill of the Plaintiff's was supplied, and the Defendant sometimes kept back the Water, and at other times let it in, in such quantities that the Mill was overflowed ; on a Bill filed for that purpose, an Injunction was granted to restrain the Defendant from preventing it flowing in regular quantities (p). (1) . It seems, that the Court cannot decree or order repairs to be done, though (a nice distinction,) an order may be made in terms that will have that effect. Thus, an order to repair the Banks of a Canal, and stop Gates and other Works, was refused ; but the effect of such an order was obtained, by an order to restrain the Defendant from further impeding the Plaintiff in the Navigation, "by continuing to keep the said Canals, or the Banks, Gates, Locks, or Works of the same respectively *out of good repair" (q). A Tenant for Life, however, [*159

(o) Redesd. Tr. Pl. 109.

C. 2 Cox 4.

(p) 1 Ch. Ca. 574 ; see also Robinson v. Lord Byron, 1 Bro. C. C. 598. S.

(q) Lane v. Newdigate, 10 Ves. 194.

But it seems, that the court has no jurisdiction in the case of a public nuisance ; but if it had, the act of carrying on banking operations, contrary to the statute, is not such a public nuisance, as will justify the court in granting an injunction to restrain such operations. *Attorney-General v. Utica Ins. Co.* 2 Johns. Ch. Rep. 379.

Yet, where the acts complained of constitute a public nuisance, and at the same time, produce a special injury to the rights of an individual, by affecting the enjoyment of his property, and the value of it, an injunction may be granted. *Corning v. Lowrie*, 6 Johns. Ch. Rep. 439.

(1) But an injunction will not be awarded to restrain the defendant from drawing off the waters of a lake, and thereby diverting the same from the plaintiff's mill, by means of a tunnel made five years ago, until the plaintiff has first established his title. *Reid v. Gifford*, 6 Johns. Ch. Rep. 19.

has been compelled to *repair* (r). The Court will grant an Injunction where there has been a forcible Entry by Commissioners of the Turnpike, for the purpose of digging Gravel on Land leased to the Plaintiff for twenty-one years and turned into a Garden (s). And so, too, it seems, according to the reasoning of *Lord Hardwicke*, an Injunction lies in the case of private persons entering by force into ground of which another has had possession for twenty-one years, though in such case there is a remedy at Law; "but that," (says his Lordship,) "would be only for a particular wrong done, and not equal to the remedy in Chancery" (t).

An Injunction will be granted to protect the enjoyment of a specific Chattel not properly the subject of compensation in damages (u). It will be granted indeed to prevent the destruction of any personal Property, not properly the subject of compensation, until the rights respecting it are ascertained; upon the principle of preventing irreparable mischief (x).

There are various other cases where an Injunction will be granted, but which it is difficult to state otherwise than in detached Propositions.

*160] *An Injunction, it seems, may, on proper grounds, be obtained to inhibit the Defendants from dissolving a Commercial Partnership (y); or to restrain a Partner from accepting or negotiating Bills of Exchange, &c. for or in the Name of the Partnership, except the same be given or negotiated by such Partner for the purposes of the Partnership (z). (1)

An Attorney or Solicitor cannot give up his client, and act for the opposite Party, in any Suits between them, and will be restrained by the Court; but if his client discharges him, he may then, it seems, employ himself in the service of the other Party (a).

If a Bankrupt bring an action against his Assignees, the Court

(r) *Prac. Chan.* p. 260. In *Birch v. Holt*, 3 Atk. 726, a motion was made in the nature of an Injunction, or rather for leave to put a Mill-dam into the same situation it was in before it was cut down: Lord Hardwicke said "he had known numbers of applications of the kind, but while the right is unheard and undetermined, the Court have as constantly denied the motion."

(s) *Hughes v. Trustees of Morden College*, 1 Ves. 188.

(t) *Hughes v. Trustees of Morden College*, 1 Ves. 189.

(u) *Lady Arundell v. Phipps*, 10 Ves. 139.

(x) *Nutbrowne v. Thornton*, 10 Ves. 168.

(y) *Chavany v. Van Sommer*, noticed 3 Wood. Lect. 416, in note.

(z) *Williams v. Bingley*, inserted in note to *Lane v. Williams*, 2 Vern. 278.

(a) *Earl Cholmondeley v. Lord Clinton*, 19 Ves. 261. S. C. Coop. 89.

(1) Mere apprehension that one partner will misapply the partnership funds, is not a ground for an injunction to restrain him from interfering with the partnership effects. *Woodward v. Schatzell*, 3 Johns. Ch. Rep. 412.

will, on the ground of long acquiescence under the Commission, grant an Injunction until the hearing (*b*).

An Injunction may be maintained, in many cases, to prevent an Executor from getting assets of a Testator into his Hands, upon particular circumstances (*c*). A Wife, for instance, an Executrix, has been restrained from getting in the assets of the Testator, her Husband being in the West Indies, and not amenable to the process of the Court (*d*). But the Court will not interfere by Injunction, merely because the Executor is not in affluent circumstances, if the Testator himself has placed this confidence in him, without regarding his circumstances (*e*). (1)

*On a Bill by Creditors against the Executor, Heir, [*161 and Purchaser, of a Real Estate charged for payment of debts, an Injunction may be obtained to restrain the payment of the purchase Money to the Heir (*f*).

In the case of Agreements on Sales, and Deposits made, if the Agreement is not performed by the time stipulated the Purchaser can bring an Action for his Deposit; but a Bill may be filed against him, praying a specific Performance, and an Injunction in the mean time.

An Injunction also may be obtained on a Certificate of the Bill filed, and Affidavit, against a surviving Partner, to restrain him from disposing of the joint Stock, and receiving the outstanding debts, he being embarrassed and in prison, and misapplying the Property (*g*).

If a Lord of a Manor has approved under the Statute, and left sufficient Common of Pasture, and the Inclosures are thrown down by the Tenants, an Injunction may be obtained, and at the hearing, an Issue will be directed, as to the rights of the Parties (*h*).

An Injunction against the Use of a Market will not be granted, at least, until a Title at Law is established (*i*).

If an *Ejectment* be brought against a *Tenant*, who makes default of the Trial, and employs the interval in doing all the mischief in his power, an *Injunction will be granted (*k*); but unless [*162 an *Ejectment* be brought, an Injunction will not lie against a *Tenant* so misbehaving himself (*l*).

(*b*) *Flower v. Herbert*, 2 Ves. 326, &c.

(*c*) *Taylor v. Allen*, 2 Atk. 213.

(*d*) *Ibid.*

(*e*) *Hathornwalte v. Russell*, 2 Atk. 126. S. C. Barn. 334.

(*f*) *Green against Lowes*, 3 Bro. C. C. 218.

(*g*) *Harty v. Schrader*, 8 Ves. 318;

and see on this subject *Read v. Bowers*, 4 Bro. C. C. 441.

(*h*) *Weeks v. Staker*, 2 Vern. 300. *Arthington v. Fawkes*, 2 Vern. 356.

Hanson v. Gardiner, 7 Ves. 309.

(*i*) *Anon.* 2 Ves. 414.

(*k*) *Sir Wm. Pulteney v. Shelton*, 5 Ves. 260, in note.

(*l*) *Lathrop v. Marsh*, 5 Ves. 259.

(1) An injunction will not be awarded in the first instance, where the bill charges an executor with abusing his trust, &c.; but a receiver may be appointed. *Boyd v. Murray*, 3 Johns. Ch. Rep. 48.

Courts of Equity interfere, in many cases, to restrain a *Breach of Covenant* (m): as where a Tenant is carrying off a Farm, Manure, &c. he had covenanted to consume upon it; but where a covenant is of such a description, that a breach of it can only be ascertained, in each instance, by a Trial, the Court will not interfere (n). An Injunction has been granted to restrain a Tenant of a Farm from breaking up Meadow for the purpose of building, contrary to express Covenant (o), and from sowing Land with *Mustard Seed* (p).

On the same Principles, an Injunction has been granted to restrain a Tenant from year to year under notice to quit, as in the case of a Lessee for a longer term, from doing damage, and from removing the Crops, Manure, &c. except according to the custom of the Country (q).

When a Covenant has been permitted to stand for a length of time (eleven years for instance) an ineffective part of the Lease, the Court it seems would not interfere on behalf of the Lessor to enjoin the Lessee; but on a Bill filed by the Lessee would *163] *restrain the Lessor from suing at Law upon such covenant (r).

The court with reluctance grants an Injunction to stay the working a Colliery, unless there is a breach of an express covenant, or an uncontroverted mischief (s).

Where there is an *Agreement* for a lease of a Farm, and the intended Lessee is in possession, and uses it "in a grossly unhusbandlike manner," and there would be a right of re-entry in the Lease, when executed, an Injunction will lie, but not be continued, with a view to a specific performance (t).

It seems, that even if no right of Entry was to be introduced under an Agreement for a Lease of a Farm, yet the court, seeing a gross case of Waste, (which will in all cases be a Forfeiture of the place wasted,) and gross breaches of covenant that could not well be indemnified by damages, would interfere by Injunction (u).

If a person sells the *Good Will* of a Trade, and afterwards attempts to set up the same Trade, in the same place, under the same sign or name, the party giving himself out as the same person, an Injunction, it seems, may be obtained (x).

An Injunction will not lie to restrain one Trader from making use of *the same mark* with another (y).

(m) *Barrett v. Blagrove*, 5 Ves. 555. S. C. on motion to dissolve the Injunction, 6 Ves. 104.

(n) See *Collins and Plumb*, 16 Ves. 454, and what is said in *Kimpton v. Eve*, 2 Ves. & Bea. 353.

(o) *Lord Grey de Wilton v. Saxon*, 6 Ves. 106.

(p) *Pratt v. Brett*, 2 Madd. Rep. 62.

(q) *Onslow v. ———* 16 Ves. 173.

(r) *Barrett v. Blagrove*, 6 Ves. 106.

(s) *Anon. Ambl.* 209.

(t) *Gourlay v. Duke of Somerset*, 18 Ves. 72.

(u) *Ibid.* 73.

(x) See *Crutwell v. Lye*, 17 Ves.

(y) *Blanchard v. Hill*, 2 Atk. 484.

Where the shares of Parties in a Ship *are not ascertained*, an Injunction may be obtained to restrain the sailing of a Ship until the share of the Party *complaining is ascertained, and a [*164 reference will be ordered to ascertain the shares and settle the security. When the shares are ascertained, the court of Admiralty is always open to applications by part-owners to restrain the sailing of Ships without their consent, until security given to the amount of their respective shares (z).

An Injunction to restrain the sailing of a Ship upon the application of a part-owner was refused, where the Ship was intended to sail the next day, and it did not appear by the Affidavit filed in support of the motion that there were any circumstances to account for the Plaintiff's delay in applying (a).

After a Decree to Account, an Injunction will be granted, on the motion of the Defendant, to restrain the Plaintiff from proceeding at Law, in an action commenced by him pending the Suit in Equity (b).

Perpetual Injunctions are granted on many occasions; against a Bond, for instance, for the purchase of an office, although the office was not within the Stat. 5 and 6 (c); and against a Bond of Resignation, (the Patron making an ill use of it,) to prevent the Incumbent demanding Tithes (d). *Such an Injunc- [*165 tion, also, has been awarded against proving a Will in the Spiritual Court, which on a Trial at Law has been found to be no Will (e). And these perpetual Injunctions remain notwithstanding the death of the Plaintiff; nor is it necessary for his Representative to file a Bill to continue such Injunction (f).

But it seems, a Bill to establish a legal Title and a *perpetual In-*

(z) *Haly v. Goodson*, 2 Meriv. 77.

(a) *Christie v. Craig*, 2 Meriv. 137.

(b) *Wilson v. Wetherherd*, 2 Meriv. 406.; *Macher v. Reed*, 1 Ball. & Bea. 318.

(c) *Hanington against Du Chatel*, 1 Bro. C. C. 126.

(d) *Durston v. Sandys*, 1 Vern. 411. S. C. 2 Ch. Cas. 186. S. C. 2 Ch. Rep. 398. See also *Peele v. Capel*, 1 Str. 534. *Grey v. Hesketh*, Ambler 268. S. C. MS. *Williams v. Cullen*, 16 June 1737, MS. 3 Burn's Eccl. Law, 336. *Babington v. Wood*, Hutt. 111. cited 1 Fowl. Eq. 252, in note. See also what is said in *Law v. Law*, Forr. 140. S. C. MS. In *Fytche v. Bishop of London*, it was decided in the House of Lords that general Bonds of Resignation were bad. See an excellent speech in the House of Lords by Bishop Watson. [Life of Watson, 1 vol. p. 180. &c.] See also *Cunningham's Law of Simony*, and what is said in *Partridge v. White-*

ton, 4 Ter. Rep. 359. A Bond to resign in favour of a particular person is good. See what is said as to this, and the decision of the Bishop of London and Fytche, in *Dashwood v. Peyton*, 18 Ves. 46, &c.; and *Arthington v. Calverly*, MS. In several cases a general Bond of Resignation is considered as good. See 3 Salk. 325, and Raym. 175, 3 Mod. 297, Sid. 387, cited in margin. A Bill passed in the House of Lords to declare the Law in these cases, but it was successfully opposed in the House of Commons, as fatal in its example, by taking away the only check, restraint, and control, upon courts of dernier appeal—the public inconvenience arising from the false determinations of the superior courts. The Bill was rejected.

(e) *Beverham v. Springold*, 1 Ch. Cas. 80; and see 2 Atk. 379.

(f) Vid. the case mentioned in *Morgan v. Scudamore*, 2 Ves. Jun. 313.

junction is never entertained, unless there are particular circumstances stated in the Bill, showing the necessity of the Court's interposition, either for preventing multiplicity of Suits, or other vexation, or for preventing an injustice irremediable by a Court of Law (g).

Perpetual Injunctions are, generally, the object for which what are termed *Bills of Peace* are instituted. The principles upon which these Bills are resorted to, will now be considered. (1)

(g) See Arg. in William Welby, Esq. Bro. P. C. 575. App. and Duke of Rutland, Resp. 6

(1) It has been decided by the Court of Chancery and the Court of Errors, in the state of *New-York*, that an injunction may be granted to secure the enjoyment of an exclusive privilege conferred by statute. Thus, where an exclusive right to navigate the waters of that state, with *steamboats*, was granted by the legislature thereof, for a term of years, a perpetual injunction was awarded to restrain boats used in violation of the plaintiff's right; although such boats were previously licensed to carry on the coasting trade, pursuant to the laws and constitution of the *United States*, and although, by another statute, boats so used, were declared to be forfeited to the grantees, and an action of *detinue* was pending to recover the boats so forfeited. *Livingston v. Van Ingen*, on appeal, 9 Johns. Rep. 507. Vide *Livingston v. Ogden*, 4 Johns. Ch. Rep. 48. *Livingston v. Tompkins*, 4 Johns. Ch. Rep. 415. *The North River Steamboat Company v. Hoffman*, 5 Johns. Ch. Rep. 300. *Ogden v. Gibbons*, 4 Johns. Ch. Rep. 150.

It is very obvious that these decisions rest upon the ground, that the several acts of the legislature, granting the exclusive right to the persons therein named, to navigate the waters of the state of *New-York*, by boats or vessels moved by fire or steam, and securing such right to the grantees, were constitutional and valid; and such as the court was bound to enforce. But the decree of the Supreme court of the *United States*, in *Gibbons v. Ogden*, 9 Wheat. 1., reversing the decree of the court of Errors of the state of *New-York*, and dismissing the complainant's bill, proceeded upon the ground that the several acts of the state legislature, were repugnant to the constitution of the *United States*, and void: And consequently, a perpetual injunction could not, in such case, be awarded.

Where a person is in the actual enjoyment of an exclusive statute privilege, it seems that an injunction will not be granted to restrain him from the use of his privilege, or of the means provided by law for its protection; especially, in favour of a party who claims only by virtue of a common right, and merely denies the right of the other party. *Lansing v. The North River Steam-Boat Company*, 7 Johns. Ch. Rep. 162.

And where a turnpike company was incorporated, with the exclusive privilege of erecting gates and receiving toll, and the road was duly opened and established, and the gates erected, &c.; and certain persons, to avoid the payment of toll, opened a by-road near the turnpike, by which travellers were enabled to avoid the gate and the payment of toll to the plaintiffs, the court awarded a perpetual injunction to prevent the defendants from using, or permitting others to use such by-road, and ordered the same to be shut. *The Croton Turnpike Company v. Ryder*, 1 Johns. Ch. Rep. 611. Vide *Newburgh Turnpike Company v. Miller*, 5 Johns. Ch. Rep. 101.

The wife's equity to a suitable provision for the maintenance of herself and children, out of her separate property descended or devised to her during coverture, will be protected, not only against the husband, but against the claims of his creditors. Thus, on a bill by the wife against a creditor of the husband, an injunction was granted to prevent him from selling property, so descended, under an execution issued on a judgment confessed by the husband for a *bona fide* debt, until such provision for maintenance should be made. *Haviland v. Myers*, 6 Johns. Ch. Rep. 25.

Where an act of the legislature authorizes the use of private property for public purposes, it ought to be provided, that a suitable compensation be made to the individual whose property is thus used or taken; and if this be omitted, the court

*VI. *Bills of Peace.*

[*166]

Bills of Peace, as they are termed, are made use of where a Person has a Right which may be controverted by various persons, at different times, and by different actions; and the Court will thereupon prevent a multiplicity of Suits (*h*), by directing an Issue to determine the Right, and ultimately an Injunction. (*l*) Another occasion where a Bill of this kind is resorted to is, where there have been repeated attempts to litigate the same question by Ejectment, and repeated and satisfactory Trials; in which cases, the Court upon such a Bill, preferred by all the Parties interested, or by some of them in the names of themselves, and the rest, will grant a perpetual Injunction to restrain further litigation (*i*).

A Judgment in a Real Action was final, and where proceedings by Ejectment were introduced, the Judgment in which was not final, but which might be brought again and again, intolerable inconveniences would have ensued if Courts of Equity had not interfered to prevent a repetition of Ejectments (*k*).—Where, therefore, there is an assertion of Title by a Suit at Law, in which the Party fails, but he yet asserts it frequently in the same manner, such assertion becomes oppressive to the opposite Party; and *as it may be made by Ejectment, a proceeding [*167 which may be repeated for ever (and which is not, as now used, part of the old Law) Courts of Equity will interfere to prevent such an oppressive proceeding, which overturns the principles of the ancient Law, whereby perpetual obligation was prevented (*l*).

After five Trials in Ejectment, and Verdicts in all of them, for *the Earl of Bath*, he brought a Bill of this description for a perpetual Injunction, and though *Lord Cowper* refused to grant it,

(*h*) See *Baker v. Shelbury*, 1 Ch. Ca. 70. 2 Atk. 484. *Devonsher v. Newenham*, 2 vol. of Sch. & Lefr. p. 208, and the cases there mentioned.

(*i*) See 1 Bro. P. C. 266. 2 Bro. P. C. 217. Bumb. 158. 1 P. Wms. 671. Lord Bath v. Sherwin, *Precedents in Ch.* p. 262. Fincke's Edit. and see (*k*) See what is said 1 Str. 404. (*l*) See *Devonsher v. Newenham*, 2 Sch. & Lefr. 211.

will grant an injunction to stay proceedings under the act, until such compensation is provided. *Gardner v. Trustees of Newburgh*, 2 Johns. Ch. Rep. 169.

An injunction will not be awarded, unless the party, applying for the remedy, has a vested right, legal or equitable, which may be greatly affected by the acts sought to be restrained. *City of New-York v. Mapes*, 6 Johns. Ch. Rep. 46.

(1) A bill of peace, to prevent a multiplicity of suits, is allowable only where the right has been satisfactorily established at law, or where the persons who controvert the right, are so numerous, as to render an issue under the direction of the chancellor, necessary. *Eldridge v. Hill*, 2 Johns. Ch. Rep. 281. But where a bill is filed for an injunction against suits at law, in trespass, and to have the title tried, and finally settled, by an issue out of chancery, it seems, that the bill will be sustained, though there had been but one or two trials at law. *Trustees of Huntington v. Nicoll*, on appeal, 3 Johns. Rep. 566.

yet the *House of Lords*, on appeal, granted the Injunction (*m*). After even *two* satisfactory Trials of an Issue *Devisavit vel non*, the Court, it seems, will interpose to prevent any further Trial (*n*), especially if they were Trials at *Bar* (*o*).

Where several verdicts have been obtained against Trespassers, an Injunction, it seems, may on such a Bill be obtained against future Trespasses; but if on such Trials the party refuses to produce documents necessary to a decision, the Court, it seems, would not grant an Injunction (*p*).

If a Trust Estate be devised to be sold, and a Bill is brought against the Trustees to oblige them to sell, and the Heir contests the Will, after *two* Trials the Court will grant a *perpetual Injunction* (*q*).

*168] *It appears that the *Lord Keeper Guildford* was of opinion that if the matter before him had been *res integra*, he should not have made altogether such a decree as *Lord Clarendon* had, whereby the *Inheritance* was bound after *one* Trial (*r*); and the Rule seems now to be that a right is never considered so fully established by one Trial at Law, as to entitle the party to a perpetual Injunction, *unless* where the Trial has been upon an Issue sent out of Chancery for the purpose (*s*).

If the Court cannot fix upon an Issue that will comprehend all the subject in dispute, it will not, it seems, interfere on a Bill of this kind, but leave the Party to his remedy at common Law (*t*).

Bills of this kind are frequent in disputes between Lords of Manors and their Tenants, and between Tenants of one Manor and another; for in these Cases there would be no end of bringing Actions of Trespass, since each Action would determine only the particular right in question between the Plaintiff and Defendants (*u*).

So, where a *Right of Fishing* upon the River *Ouse*, for nine miles in extent, was claimed by the Corporation of York, who had constantly exercised that right, but which was opposed by different Lords of Manors, a Bill of this description was admitted, to establish the Right against these several opponents, for it *169] would have been endless for the Corporation *to have brought Actions at Law (*x*). In this case, it is observable, that

(*m*) *Lord Bath v. Sherwin*, *Preec. Ch.* 261; and *S. C.* as it seems, in *Lucas's Rep.* p. 1, and 1 *Bro. P. C.* 266, on the appeal. See also *S. C.* noticed in *Leighton and Leighton*, 1 *P. Wms.* 672.

(*n*) *Bates v. Graves*, 2 *Ves. Jun.* 293.

(*o*) See 1 *P. Wms.* 671. *S. C.* 1 *Str.* 404, and 2 *Bro. P. C.* 217. *Coker v. Farewell*, 2 *P. Wms.* 563. See also on this subject *Devonsher v. Newenham*, 2 *Sch. Lefr.* 211.

(*p*) *Field v. Beaumont*, 1 *Swanst.* 110.

(*q*) *Leighton v. Sir Edward Leighton*, 1 *P. Wms.* 671.

(*r*) *Fitton v. Macclesfield*, 1 *Vern.* 292.

(*s*) *Robinson v. Lord Byron*, 2 *Cox*, 5, 6. *S. C.* 1 *Bro. C. C.* 568.

(*t*) *Lowther v. Ray, et al.* *Trin.* 8 *Geo. II.* 1733, *MS.*

(*u*) *Lord Tenham v. Herbert*, 2 *Atk.* 483; and see *Hansen v. Gardiner*, 7 *Ves.* 310.

(*x*) *Mayor of York v. Pilkington*, 1 *Atk.* 282; and see *Lord Tenham v. Herbert*, 2 *Atk.* 483.

whilst the Suit was pending, the Plaintiffs caused the Agent of the Defendant to be indicted for a breach of the Peace in fishing in their Liberty; and upon a motion made before *Lord Hardwicke* to stop the prosecution, he observed, "This Court has not originally, and strictly any restraining power over criminal prosecutions (y); and in this case, if the Defendant had applied to the Attorney-General, he would have granted a *noli prosequi*. For where a complaint is grounded on a Civil Right, for which an Action of Trespass would lie, the Attorney-General of course grants a *noli prosequi*. If Actions of Trespass had been brought *vi et armis*, this Court would have stopped them; but though I cannot grant an Injunction, yet I may certainly make an order upon the Prosecutors to prevent the proceeding on the Indictment. Supposing it was a Suit for a right of Land where entries had been made, and the Bill was brought to quiet the possession, and after that they prefer an Indictment for a forcible entry, which is of a double nature, as it partakes of a breach of the Peace, and is also a Civil Right, this Court would certainly stop the proceedings upon such indictment. Where Parties submit their right to the Court, they have certainly a Jurisdiction, and may interpose. Therefore I will make an Order to restrain the Plaintiffs from proceeding at the Sessions till the hearing of the Cause, and further Order (z)."

*Such a Bill may be brought as well by Tenants against [*170 a Lord, as by a Lord against Tenants (a); as, for instance, to settle a *general fine* to be paid by all the Copyhold Tenants of a Manor (b).

Such a Bill has been entertained at the instance of the *New River Company*, to quiet them in the possession of Pipes laid through the Defendant's field (c); and respecting Suit to a Mill (d); or for *Toll through* (e); and where several Tenants claimed a right to the *Profits of a Fair* (f). So on a Bill showing that one Commoner had recovered one shilling, or other small damages against the Plaintiff for oppressing the Common, or for using the Common where he ought not, and praying that the Defendant, another Commoner, might accept of like da-

(y) See ante.

(z) 1 Atk. 302. *Mayor, &c. of York v. Pilkington*; and see 2 Ves. 398, and what Lord Eldon says in *Attorney-General v. Cleaver*, 18 Ves. 220. The Chancellor has no jurisdiction to grant an Injunction to stay proceedings on a Mandamus, nor to an Indictment, nor to an Information, nor to a Writ of Prohibition. [*Lord Montague v. Dubman*, 2 Ves. 398.]

(a) *Conyers v. Lord Abergavenny*, 1 vol. Atk. 285.

(b) *Cowper v. Clerk*, 3 P. Wms. 156; see Bumb. 41.

(c) 2 Vern. 231. *New River Company v. Graves*.

(d) Sir Lionel Pilkington's case in the Duchy Court, cited 1 Bro. 40. See also *Duke of Norfolk v. Myers*, 4 Madd. Rep. 83. The decree in Sir Lionel Pilkington's case, and in other cases, is there noticed. It is no objection to such a Bill that the custom has been established by a former Bill. Ibid.

(e) *Corporation of Carlisle v. Wilson*, 13 Ves. 276.

(f) *Merrett v. Eastwicke*, 1 Vern. 266. 1 vol. Eq. Cas. Abr. p. 79. pl. 2.

mages for what was past, to prevent charges at Law, the *Lord Keeper Guildford* said, it was in the nature of a *Bill of Peace*, and was proper (g). There are cases where Bills of Peace have been brought, though there has been a general right claimed by the Plaintiff, and yet no privity between the Plaintiffs and Defendants, nor any general right on the part of the Defendants, and where many more might be concerned than those brought before the Court. Such are Bills for Duties ; *171] *as, in the case of the *City of London v. Perkins*, in the House of Lords, where the City of London brought only a few persons before the Court, who dealt in those things whereof the duty was claimed, to establish a right to it ; but because a great number of Actions might be brought, the Court suffer such Bills, though the Defendants might make distinct defences, and though there was no privity between them and the City (h).

It has been determined, however, that a Bill of Peace will not lie for the mere purpose of settling the boundaries of two *Manors* (i) ; or two *Parishes*, to have the boundaries of each ascertained (k). "It would be," said *Lord Thurlow*, "to try the Boundaries of all the Parishes in the Kingdom on account of the Poor Laws." He apprehended these Issues had usually been directed by consent of the Parties (l). It seems too, that the Court on a Bill of this nature will not decree a perpetual Injunction for the enjoyment of, nor establish the right of a Party who claims in contradiction to, a *public right* ; as a right to a Highway, or a common navigable River ; for that would be to enjoin all the People of England (m). Where, therefore, a Bill was brought to be quieted in the possession of an ancient *Ferry*, used with a Rope over the River *Ware*, against twenty Defendants, who had cut the Rope, with a view, as it was insisted, to avoid Multiplicity of Actions, the Chancellor observed, "Plaintiff may have trespass for cutting the Rope : a Ferry is in the nature of an Highway ; *172] and a Bill does *not lie to be quieted in the possession of a Common ; but that is of a different nature : this is a navigable River, and the Rope to the Ferry is an obstruction of the Navigation ; if Plaintiff has any such right there is proper remedy for him at Law" (n).

Nor can a Bill of this description be maintained, where a right is disputed between two persons only (o). As where a Bill was

(g) *Pawlet v. Ingrey*, 1 Vern. 308, 1 vol. Eq. Cas. Abr. p. 79. pl. 2.

(h) 4 Bro. P. C. 157.

(i) *Wake v. Conyers*, 2 Cox 360.

(k) *Parish of St. Luke, Old Street, against the Parish of St. Leonard, Shoreditch*, 1 Bro. 40.

(l) *Id.* *ibid.*

(m) *Mitford's Pleadings*, 129.

(n) *Harrison's Ch.* 1 vol. p. 125.

(o) *Lord Tenham v. Herbert*, 2 Atk. 483, and *Whitchurch v. Hide*, *Ibid.* 391 ; see also 4 Bro. P. C. 157. Vin. tit. Ch. 425. pl. 35 ; see also *Cowper and Clerke*, 3 P. Wms. 156. "According to this distinction," says Lord Chancellor King, "are the Cases, 1 Ch. Rep. 33, and 96 ;" see also *Fortescue*, p. 42 and 44, and the case of *Webb and Conyers*, cited 1 Bro. G. C. 40. *Welby* and

brought by *one Tenant* of a Manor, suggesting a custom for the Tenants of the Manor of A. (of which he was one) to cut Turves in the Manor of B. to quiet him, and to have an Issue directed as to the right; upon this occasion the Court said, "This Bill is improper, and inconsistent with the nature and end of a Bill of Peace, which is, that *where several persons* having the same right are disturbed, on application to the Court to prevent expense and multiplicity of Suits, issues will be directed, and one or two determinations will establish the right of all parties concerned, on the foot of one common *Interest, and the [*173 Bill is preferred by all the parties interested, or a determinate number, in the name of themselves and the rest; but in this case one only brings the Bill on the general right, and not on the foot of any particular distinct right; and therefore the Bill was dismissed with costs (p).

A Bill of this kind should not merely pray Special Relief, as that the Plaintiff may be quieted in the possession till the right is tried at Law; but should also pray relief in the Premises, or a perpetual injunction: and in a case where it was deficient in that respect, the Bill when it came to a hearing was directed to be amended in that particular (q).

VII. *Bill of Interpleader.*

A *Bill of Interpleader*, (similar in some measure to the *tertius interveniens* of the Civil Law (r), and to the doctrine of Interpleading at Law, in cases of *Bailment* (s), is resorted to, where a person claiming no right in the subject, and not knowing to whom he ought of right to render a Debt or Duty, apprehends injury from claims made (a mere *claim* is a ground of *Interpleader*) (t), (1) by two or more, claiming in different or separate Interests, the same Debt, or the same Duty (u). And this, though the Demand of one Defendant is by virtue of an alleged *legal*,

the Duke of Rutland, 6 Bro. P. C. 575, in which case, as Lord Thurlow observes, in *Weller and Smeaton*, 1 Bro. C. C. 573. S. C. 1 Cox, 102, "most of the cases on the subject had been looked into, and it was found that in no instance, except that of *Bush and Western*, Prec. Ch. 530, had this Court ever interfered in a mere question of right between A. and B. they having an immediate opportunity of trying the right at Law which would be definitive."—The same case is shortly noticed in 2 *Dick. Rep.* 442; and see S. C. cited 2 vol. *Sch. and Lefr.* p. 209; see also on

this subject *Finch v. Resbridge*, 2 Vern. 390, and the note.

(p) *Harrison's Ch.* vol. 1. p. 124.

(q) *Ewelme Hospital v. Andover*, 1 Vern. 266.

(r) *Gilb. For. Rom.* c. 4.

(s) *Langston v. Boylston*, 2 Ves. 109.

In cases of *Bailment*, where the Parties may be compelled to interplead at Law, a Bill of *Interpleader* is not sustainable. See *Redesd. Tr. Pl.* p. 39, n. o; 3d edit.

(t) *Langston v. Boylston*, 2 Ves. jun. 107.

(u) *Dungey v. Angove*, 2 Ves. Jun. 310. *Redesd. Tr. Pl.* 39. 3d. ed.

(1) Vide *Richards v. Salter*, 6 Johns. Ch. Rep. 445.

*174] and the *other. of an alleged *equitable* right (*x*); (1) but if the Plaintiff has parted with the Property he cannot sustain an Interpleading Bill against Defendants, Claimants, upon an undertaking to pay over the value to the party entitled (*y*). The Bill states the situation of the Plaintiff, the conflicting claims upon him, and prays that such Claimants may *interplead*, so that the Court may adjudge to whom the Debt, Duty, or Property belongs, and that the Plaintiff may be thereby indemnified. The Plaintiff should also by his Bill offer to bring the Money, or Property claimed, into Court; and if such offer is not made by the Bill, the Court, upon the application of either of the Defendants, will order the Plaintiff to bring such Property, or pay the Money into Court, or into the Bank, in the name of the Accountant-General, in trust in the cause, for the benefit of the party to whom the Court at the hearing of the Cause should decree the same to belong (*z*). If the Defendants have commenced Actions at Law, (unless they are Ejectments) (*a*), or Suits in Equity, an Injunction must be prayed to restrain the Claimants from proceeding till the right is determined (*b*). In support of the motion for an Injunction, an Affidavit of the facts may be read (*c*). An Injunction, however, will not be granted immediately on *175] the filing of the Bill *and an Affidavit, as in cases of Waste (*d*); the common Injunction must first be obtained, and afterwards on motion an Injunction to stay Trial. And, it seems, the Plaintiff never can proceed compulsorily, by Injunction, till he has brought the Money into Court (*e*), though there are some cases that point to a contrary doctrine (*f*). In the *Exchequer*, when the Plaintiff produces a certificate of the Deputy Register that the Money is paid into Court, it is a Motion of course to grant the Injunction (*g*).

Such a Bill, in respect of a sum under 10*l.*, has in the *Exchequer*, been dismissed, as being beneath the dignity of the Court (*h*).

There must be annexed to the Bill, or upon the filing of it,

(*x*) *Morgan v. Marsack*, 2 Meriv. 111.

(*y*) *Burnett v. Anderson*, 1 Meriv. 405.

(*z*) In *Thanet v. Patterson*, 3 Barnard, 247, the Bill was held not to be an Interpleading Bill, because it did not contain an offering to bring the Money into Court; see 2 Ves. Jun. 109. *Langston v. Boylston*. In strictness, perhaps, it is ground of Demurrer, Redesd. Tr. Pl. 116.

(*a*) 2 Anstr. 531, in note, and 3 Anstr. 798.

(*b*) *Langston v. Boylston*, 2 Ves. Jun. 101. *Dungey against Angove*, 3 Bro. C. C. 36.

(*c*) *Ibid.*

(*d*) *Croggan v. Symons*, 3 Madd. Rep. 130. *Sed quæ.*

(*e*) *Prac. Reg.* Wyatt's edit. 78. 3 Bro. C. C. 36. *Paris v. Gilham*, Coop. 56.

(*f*) See the cases cited in Mr. Hollist's Arg. 3 Bro. 36. *Dungey v. Angove* and others.

(*g*) 1 Fowler's Prac. 296.

(*h*) 2 Anst. 530.

there must be made (i) an Affidavit by the Plaintiff, that he doth not exhibit his Bill by *Fraud or Collusion* with the Claimants, but *spontaneously*, for his own security; but he need not swear that the Bill was filed at his *own expense* (k); nor, it seems, that it is filed without the *knowledge* of either of the Defendants (l), though in the forms of such Affidavit, in some books of Practice (m) that allegation is introduced. If no such Affidavit is made, the neglect affords ground for a Demurrer (n). The more usual way is to annex the Affidavit to the Bill. *If the Affidavit is false, the Party is liable to a Prosecu- [*176 tion; but the Court will not determine it to be false upon a counter Affidavit (o); though if there be suspicion of collusion the Court will direct an inquiry into the circumstances: and in a case in which a Report confirmed the fraud, the Bill was dismissed with costs, as between Attorney and Client, to be paid by the Plaintiff and his Solicitor, and the latter was ordered to show cause why he should not be struck off the Roll (p).

It must appear by the Bill that there is some person capable of interpleading; and it must show that there is such a person in *rerum natura* as can interplead (q). It must also show that each of the Defendants whom it seeks to compel to interplead, claims a right, otherwise both the Defendants may demur; the one, because the Plaintiff shows no claim of right in him; the other, because the Bill showing no claim of right in the Co-Defendant, shows no cause of Interpleader (r). If the Plaintiff shows no right to compel the Defendants to Interplead, whatever rights they may claim, each Defendant may demur (s).

If on a Bill of Interpleader all the Defendants but one live out of the Jurisdiction, the Plaintiff, after a reasonable time, having used due diligence to bring them in, will be decreed to give up the subject to the only Defendant who appears, and will be protected afterwards against the others by Injunction, and order *that service on the Attorney should be a good [*177 service (t).

So, though one of the Defendants has not appeared to the Bill, and the usual process of contempt has been gone through (u),

(i) To such a Bill against the Attorney-General and others, there must be an affidavit annexed, Bunb. 303.

(k) 1 Ves. Jun. 248. Metcalf v. Harvey.

(l) Stevenson v. Anderson, 2 Ves. & Bea. 410.

(m) See Harrison's Pract. Edit. NewL. p. 402.

(n) Redesd. Tr. Pl. 116.

(o) 2 Ves. Jun. 310. Dungey v. Angove. Stevenson v. Anderson, 2 Ves. & Bea. 410.

(p) 2 Ves. Jun. 304. Dungey v. Angove.

(q) 1 Ves. Sen. 248. Metcalf v. Harvey.

(r) Redesd. Tr. Pl. 115.

(s) Ibid.

(t) Stevenson v. Anderson, 2 Ves. & Bea. 407; and see Edwards v. Helmuth, 2 Ves. & Bea. 412, 2d Edit. & S. C. Coop. 245.

(u) Fairbrother v. Prattent and another, 1 Daniel, 64.

or if one of the Defendants does not appear at the *hearing*, a Decree will be made (x).

An Interpleading Bill is considered as putting the Defendants to contest their respective claims, just as a Bill by an Executor or Trustee to obtain the direction of the Court upon the adverse claims of the different Defendants. If, therefore, at the hearing, the question between the Defendants is ripe for decision, the Court decides it, and if it is not ripe for a decision, directs an Action, or an Issue, or a reference to the Master, as may be best suited to the nature of the case (y).

Such a Bill lies where a Tenant may be liable to pay his Rent to one or two persons claiming the same Rent in privity of Tenure and privity of Contract, as in the case of Mortgagor and Mortgagee, Trustee and *Cestui que Trust*, or where the Estate is settled to the use of a married woman, of which the Tenant has notice, and the husband has been in the receipt of the Rent, and differences arise between them, and she claims the Rent. There may be a variety of Cases in which the Tenant, not disputing the Title of the Landlord, but affirming that Title, the Tenure, and the Contract by which the Rent is payable, but where it is uncertain to whom it is to be paid, may file a Bill *178] of Interpleader (z). But a Tenant *cannot file a Bill of Interpleader against his Landlord, on notice of an Ejectment by a *stranger*, under a title adverse to that of the Landlord (a). This Rule, however, does not hold where the question arises upon the act of the Landlord *subsequent* to the Lease (b). As where a Lessee of Tithes filed such a Bill against the Lessor the Vicar, and his Assignees under an Insolvent Act, of which he took the benefit *subsequent* to the Lease, each of them claiming the Rent; in which case, the Court directed an Action to be brought by the Assignees, and to be defended by the Vicar (c). So, in *Lord Thomond's Case*, a Bill of Interpleader was filed by Tenants against their Landlord, and Persons claiming Annuities *subsequent* to the Lease, and the Bill was sanctioned by Sir Thomas Sewell, the Tenant being by the Act of the Lessor entangled in a question which he could never settle (d). If a Guardian, having an Infant in his custody, conceals and will not produce him, but sets up a Title to himself, and the Plaintiff suggests by his Bill that the Infant has a right to controvert that Title, "in such a Case, and so charged," says Lord Hardwicke,

(x) *Hodges v. Smith*, 1 Cox, 337. S. C. mentioned 16 Ves. 203.

(y) *Angell v. Haddon*, 16 Ves. 205.

(z) 2 Ves. Jun. 32. *Dungey v. Angove*. *Hodges v. Smith*, mentioned in *Angell v. Haddon*, 16 Ves. 205.

(a) *Ibid*; see also *Clarke v. Byne*, 13 Ves. p. 388.

(b) *Cowtan v. Williams*, 9 Ves.

107; see also *Clarke v. Byne*, 13 Ves. p. 385.

(c) *Cowtan v. Williams*, 9 Ves. 107; and see *Redeod. Tr. Pl.* 115, and the cases there cited. It was determined at Law that the profits of the Vicarage did not belong to the Creditors, 9 Ves. 107.

(d) 9 Ves. 107.

“I will not say but such a Bill might be brought to compel the Guardian to produce him (e).”

If one who is not a party to a Suit supposes he has a separate Interest in the matter in question, and *commences his [*179 Suit against the Defendant, praying to be relieved according to his right, the Plaintiff in the first Suit may make the Plaintiff in the second Suit a Defendant, in order to interplead, and contest the right (f). A mere *stakeholder* may file such a Bill (g), as, for instance, Agents for Captures (h), or a Captain, where Parties claim adversely under a Bill of Lading; but it seems where the adverse claims are paramount to the Bill of Lading he cannot file such a Bill (i). But in a subsequent case, *Morley v. Thompson*, 29th July, 1819, the Vice Chancellor, on reconsideration, held, a Captain might file such a Bill, although the adverse claims were paramount to a Bill of Lading. So an Auctioneer may file such a Bill where the Vender and Purchaser both claim the deposit made on the Sale (k). So a *Factor* having contradictory claims upon him may file such a Bill (l).

Where a House, insured, was burnt down, and the *Tenant* filed a Bill for the specific performance of an Agreement for a Lease to the Plaintiff, against an Insurance Company, to have the Insurance Money laid out in the rebuilding of the Premises, and the Landlord brought an Action on the Policy; the Insurance Company, it was held, were entitled to file a Bill of Interpleader, and to be paid the Costs of both Suits, and of the Action at Law, out of the Fund in Court (m).

Where several Bills are brought *by the same Person* and for the same thing, or in case of an Infant, where several Bills are brought, by several *prochein Amys* *for the same thing, the [*180 Court will, *on motion*, stay the proceedings in all but one Suit; but the Court will not interfere thus arbitrarily, except in these Cases; for, says *Lord Hadwicke*, every person in a free Country, as this is, has a right to bring his Suit and be heard (n): and accordingly he would not stay proceedings in a Case where two Bills had been filed for the same purpose against the Defendant, the one by the party interested himself in a co-partnership Account, and the other by an Assignee of that Plaintiff, though there were great marks of its being a contrivance (o).

A Bill, praying that a *Modus* might be established, and that

(e) 1 Ves. Sen. 249. *Metcalf v. Hervey*.

(f) *Prac. Reg.* p. 78, last Edit.

(g) 6 Ves. Jun. 418. *Aldridge v. Mesner*.

(h) See *Suttons v. Earl of Scarborough*, 9 Ves. 73, where in the Pleadings such a Bill is stated to have been brought, and an Issue directed.

(i) *Lowe v. Richardson*, 3 Madd. Rep. 277.

(k) *Fairbrother v. Prattent* and another, 1 Daniel, 64. *Nerot v. Harris*, *Ibid.* in note to p. 68; and see the form of the Decree there.

(l) *Martinius v. Helmuth* and another, *Coop.* 245. S. C. 2 Ves. & Bea. 407, 2d Edit.

(m) *Paris v. Gilham*, *Coop.* 56.

(n) *Ambler* 103. *Gage* against *Bulkley*.

(o) *Ibid.*

the Rector of Market Bosworth, and the Rector of Sibson, might interplead as to the Tithes to be covered by the Modus, was dismissed (*p*).

Where Money in the Public Funds is the subject of a Suit, to which the Bank is made a Defendant, the Court will not on the Application of a Bank make an order on the litigating Parties to restrain them from proceeding at Law against the Bank to compel a Transfer, but they must file a Bill of Interpleader (*q*).

If on a Bill of Interpleader a Trial at Law is directed between the Defendants, the Suit is thereby ended as to the Plaintiff; and if the Plaintiff dies, the Defendant may still proceed without reviving the cause (*r*).

*181] If an Interpleading Bill is properly instituted the *Plaintiff is entitled to his Costs out of the Fund in Court (*s*); and if there be no fund in Court, the Costs will be given against the Party who occasioned the Bill (*t*). (1) Costs may be given as *between the Defendants* to an Interpleading Bill (*u*). (1) Justice requires this, and it has been done in several Cases; the decision to the contrary, of *Dewson and Hardcastle* (*x*), not having been followed.

In a case where one Defendant did not appear at the hearing of the Cause, a Decree was made in favour of the Defendant who appeared, and the Plaintiff was directed to retain his Costs, and that the Costs so retained, and also the Costs of the Defendant who appeared, should be paid by the other Defendant; and the Injunction was made perpetual against him (*y*).

If the Assignees of a Bankrupt claim goods taken in execution, and the Assignees and the Plaintiff in the Execution both refuse to indemnify the Sheriff, a Court of Law will protect him, and arrange the proceedings so as to secure the Property and try the right (*z*), and by this means prevent the necessity of a Bill of Interpleader.

It is very obvious that Bills of Interpleader may on many occasions be advantageously resorted to; but the Court does not look very favourably upon them, and *Lord Hardwicke* expressed him-

(*p*) *Woolaston and others v. Wright*, 3 Anstr. 801.

(*q*) *Birch v. Corbin*, 1 Cox, 144.

(*r*) 1 Vern. 352, last edition, Anonymous.

(*s*) 2 Bro. C. C. 149. *Aldridge* against *Thompson*, recognised 16 Ves. 204. *Cowtan v. Williams*, 9 Ves. 108.

(*t*) *Aldridge v. Mesner*, 9 Ves. 419.

(*u*) *Cowtan v. Williams*, 9 Ves. 108, and the cases in note; see also *Edensor v. Roberts*, 2 Cox. 280.

(*x*) 1 Ves. Jun. 368. S. C. 2 Cox, 278.

(*y*) *Hodges v. Smith*, 1 Cox, 357.

(*z*) See *M'George v. Birch*, 4 Taunt. 585.

(1) Where one defendant, by setting up a groundless claim, had compelled the plaintiff to resort to a bill of interpleader, and another defendant was entitled to the fund, which had been paid into court, it was resolved, that the former should pay the costs of the party whose claim was established, and also the costs of the plaintiff in chancery. *Richards v. Saller*, 6 Johns. Ch. Rep. 445.

self unwilling *to allow new inventions in the bringing of [*188 such Bills (a).

VIII. Bills of Certiorari.

A. Special Writ of Certiorari is frequently prayed for in a Bill filed by one who is *Defendant* (b) in a Suit in an inferior Court of Equity, (the Court of Equity in the Exchequer Chamber, though a particular, is not an inferior, Jurisdiction) (c), having limited Jurisdiction, such as *Courts of Equity in the Counties of Palatine of Chester, Durham and Lancaster* (d), the *Courts of Great Sessions in Wales* (e), the Courts of the two *Universities of Oxford and Cambridge*, the *Courts of the City of London*, and the *Cinque Ports*, to remove a Cause into the Court of Chancery, upon a suggestion, either that the cause is out of the Jurisdiction of the Inferior Court, or that the Defendants, or the Witnesses, live out of its Jurisdiction, and are not able, owing to Age or Infirmities, or the distance at which they live, to attend such Inferior Court, or cannot be compelled by the process of such Court to be examined there, and that for these or other reasons, assigned in the Bill, equal justice is not likely to be obtained.

This Bill does not pray that the Defendant may answer, or even appear to the Bill, and consequently it prays no Writ of Subpœna (f).

*When the Party has filed his Certiorari Bill, on Mo- [*188 tion, and a Certificate from the Six Clerk that the Bill is filed, the Certiorari Writ prayed for by it will be granted by the Lord Chancellor, and is usually directed to the Judge of the Inferior Court, requiring him to certify, or send to the Court the Tenor of the Bill or Plaint there, with the process and proceedings thereupon. When the Order is passed and entered, the Clerk in Court procures the Writ, and upon the making out and receipt of it, a bond is entered into before the Register, by the Plaintiff in the Certiorari Bill, together with a surety, to the Master of the Rolls, in a penalty of 100*l.*, conditioned, that the Plaintiff shall prove the suggestion of his Bill in fourteen days after the return of the Writ, which is returnable within fourteen days after its being served on the Defendant. Upon the Writ of Certiorari being served and returned, a motion is made to file the same, which will thereupon be ordered to be filed, together with the proceedings removed. If it appear by the *Plaintiff's own show-*

(a) *Metcalf v. Harvey*, 1 Ves. 249.

(b) Such a Bill cannot be filed by the Plaintiff in the Inferior Court, Jacob's Ch. Prac. 1 vol. 680.

(c) Redesd. Tr. Pl. p. 8, in note. (a)

(d) 1 Ch. Ca. 31.

(e) Dougl. 5, note 2.

(f) Redesd. Tr. Pl. p. 49. Pract. Reg. 82. According to some precedents a Subpœna is prayed; see 2d vol. Jacob's Chancery Prac. 683.

ing, in the *Bill* filed by him in the Inferior Court, that he lives out of the Jurisdiction of such Court, then the Plaintiff in the *Certiorari* Bill, without proving any allegation in his Bill, may obtain an Order, on Motion or Petition, to retain the Bill removed; after which the Defendant must put in an Answer as if the Cause had been originally instituted in the Court in which the Bill of *Certiorari* is exhibited.

When Interrogatories to prove the suggestions of the *Certiorari* Bill are necessary, they must be filed with the Examiner, and Witnesses examined by the Plaintiff, and by him only, for the *184] Defendant is not *permitted to examine or to publish any thing to disprove their Testimony. An Order must be procured by Motion or Petition to refer such examination to a Master, and for the Examiner to attend with the depositions. The Master's report must then be obtained; and if he certifies the suggestions of the Bill to be proved, the Court may be moved, upon such report, to have the Bill retained. If the suggestions of the Bill cannot, from circumstances, such as the remoteness of the Witnesses, or other good cause, be proved within the fourteen days, further time to make such proofs may be obtained on a Motion or a Petition supported by an Affidavit of the Circumstances.

The Proofs on this occasion are not afterwards made use of upon the hearing of the removed Cause; but the Parties after such removal proceed in the ordinary course, and to the examination of witnesses, if necessary: for the proofs in the *Certiorari* Bill are only for the purpose of giving the Court Jurisdiction.

If the suggestions of the *Certiorari* Bill are not proved, a *Procedendo* may be applied for, and obtained, which is a Writ directed to the Judge of the Inferior Court, requiring him to proceed in a Cause which was sought to be removed into a Court of Equity by *Certiorari*, &c. the Plaintiff in the *Certiorari* Bill not having sufficiently proved the suggestions in such Bill (g).

If upon a *Certiorari* Bill the Cause is brought on to a hearing, *185] the Court, if they think fit, may make a *Decree, or send it back to the Inferior Court to be determined; and the Court has sent it back before the hearing after publication passed, and a Subpœna served to hear Judgment (h).

Where the *Certiorari* Bill was to remove a Cause out of the Mayor's Court, the Plaintiff's witnesses living out of the Jurisdiction, and the Bill sought an Account touching other matters, and the Plaintiff, in the Mayor's Court, moved for a *Procedendo*, the Court directed the Cause to stand to be heard on the Bill in this Court (i).

(g) *Rogers v. —* before Vice Chancellor Plumer, 23d June 1815. MS.

(h) *Stephenson v. Houlditch*, 2 Vern. 491.

(i) *Rich v. Jaquis*, 1 Che. Cas. 31.

IX. Bill to perpetuate Testimony.

The very title of this Bill explains its use. The *Lord Keeper Egerton* expressed his dislike of these Bills, because the Depositions are not *ordinarily* published, but upon oath that the witnesses are dead, so that the witness is not affected by the fear of temporal punishment. Indeed, the *Lord Chancellor Parker* was of opinion that such evidence would not amount to Perjury at Law, no issue being joined (b).

When the Testimony of Witnesses is in danger of being lost before the matter to which it relates can be made the subject of Judicial investigation, a Court of Equity will lend its aid to preserve and perpetuate the testimony; and as the Courts of Common Law cannot generally examine Witnesses except *visa voce*, upon the Trial of an Action, the Courts of Equity *will [*186 supply this defect by taking and preserving the testimony of Witnesses going abroad, or resident out of the Kingdom, which may afterwards be used in a Court of Common Law (l).

Bills of this description may be filed by persons out of Possession, as well as by persons in possession. If an Action at Law be brought by one out of possession, he may file this Bill for an examination of Witnesses infirm or aged, *de bene esse*, when his testimony is in danger of being lost before the matter to which it relates can be made the subject of Judicial Investigation; so a person in possession, and undisturbed, who has therefore no opportunity of examining his Witnesses at Law, and is fearful of future proceedings against him, may, under this Bill, examine such witnesses (m). In both these cases the Bill filed, may, it seems, be properly termed a Bill to perpetuate Testimony, though the situation of the parties requiring such Testimony be very different (n).

The Bill sets forth the Plaintiff's Title to the thing in question, or interest in the subject—the Matter touching which the Plaintiff is desirous of acquiring evidence—the Interest in the Defendant to contest the Title of the Plaintiff in the subject of the proposed testimony—that the witnesses are old and infirm, or sick, and not likely to live, or that they are going to Sea (o), or are beyond sea (p), or that the facts to be examined to are of

(k) *Cann v. Cann*, 1 P. Wms. 569; and see what is said 2 Eq. Abr. 402.

(l) *Redesd. Tr. Pl.* 120.

(m) 6 Ves. 251.

(n) *Sed vid.* 6 Ves. 251.

(o) The plaintiff will not be allowed to examine witnesses *de bene esse*, be-

cause they are going to the East Indies, if they are his servants, and he might keep them at home, *Bunb.* 320. *Com. Dig. Tit. "Chancery, R."*

(p) See what Lord Mansfield says in *Fabrigas and Mostyn*, 11 vol. *State Trials*, p. 196.

*187] great importance, and no other but the *Witness (*q*), or two Witnesses (*r*) to be examined, is or are privy to them, whereby the Plaintiff is in danger of losing his Testimony. The Bill ought also to state, that the facts about which the Witnesses are to be examined cannot be immediately investigated in a Court of Law, or, that before an investigation can take place (*s*), the evidence of a material Witness is likely to be lost by his Death, or departure from the Realm (*t*). A Commission is then prayed to examine them, to the intent that their testimony may be preserved, and a Subpoena is also prayed to the parties interested, to show cause, if they can, to the contrary; but the Bill should pray no other relief (*u*). If the Defendant shows cause to the contrary within fourteen days, the Plaintiff is not allowed to proceed (*x*).

After the Bill is filed, the Court on an Affidavit verifying the facts stated in the Bill, and that the Witnesses are material, will, *188] on Motion or Petition (*y*), *grant a Commission if the Witnesses live in the Country, or beyond Sea. If they reside within ten miles of London, it will order them to be examined in Court, *de bene esse*, saving just Exceptions to the other side, which will make their depositions valid in that cause only, and against those who are Parties to it, and all those claiming through some or one of them (*z*), whose interest has accrued since the Bill was preferred; but the Depositions must not be taken *ex parte*, without notice, otherwise they will be suppressed (*a*).

A Defendant may examine Witnesses under the Plaintiff's Commission, and if a Witness dies may move to have his deposition published, if necessary (*b*).

If the Defendant afterwards answers the Bill, the Plaintiff should reply, and examine, *de novo*, the Witnesses before exam-

(*q*) 3 P. Wms. 77. Shirley et al. v. Earl Ferrers, and the cases cited in note 1; see also Hankin against Middleditch, 2 Bro. C. C. 641. Pearson v. Ward, 1 Cox, 178. In this case a motion was made to examine a witness *de bene esse* before an answer, and, on an affidavit in what manner the testimony affected the cause, an order was made for the examination, with liberty to the Defendant to cross examine the Witness at the same time, and the Plaintiff was ordered to pay all the costs of parties on such examination.

(*r*) Lord Cholmondely against the Earl of Oxford, 4 Bro. 157.

(*s*) A Court of Law, it is observable, will not upon motion give leave to examine an attesting Witness to a deed upon interrogatories, and to give such examination in evidence at the trial, on the ground that he is incapable, through illness, of attending in person, and that

he is not likely to recover, so as to be able to attend, notwithstanding it also appears by the Affidavit that the Defendant had at one time admitted the execution of the Deed. [Jones v. Brewer, 4 Taunt. 46.]

(*t*) See as to this, Redesd. Tr. Pl. p. 41.

(*u*) 1 Sch. & Lefr. 316. 3 Atk. 439.

(*x*) 2d vol. Com. Dig. 291. Prac. Reg. 31.

(*y*) Philips v. Carew, 1 P. Wms. 117. 3 P. Wms. 77. Jones v. Earl of Strafford, 1 Atk. 450.

(*z*) See the opinion of the Judges in the case of the Banbury Claim of Peerage, Dom. Proc. delivered on the 30th May 1809.

(*a*) Lovedon against Milford, 4 Bro. C. C. 540.

(*b*) Earl of Abergavenny v. Powell, 1 Meriv. 434.

ined, who are alive, and upon the return of the Commission, publication is made of the Depositions thereby taken, with the Depositions of the Witnesses before examined, who were dead before the second Commission (c).

Depositions taken *de bene esse*, in these cases, may by the consent of the Parties, be published whilst the Witnesses are alive ; but otherwise, depositions taken on these Bills are not, as before observed, ordinarily published, but upon oath that the depositions of such Witnesses are necessary, and that they are either dead, and therefore incapable of being examined *in chief*, (as they ought to be, if possible), *or so aged or incapable, [*189 that they cannot travel or testify without danger to their lives (d). Or that the Witness is gone to a great distance ; or, in a word, that there is a *moral impossibility* in having an examination *in chief* (e).

If a Bill of this kind be filed, and the Defendant puts in no Answer, and an Order is obtained for the Examination of the Witness, and notice of the same is given to the Defendant, and of the Interrogatories intended to be put, and the Witness is examined on the evening of the day on which the notice was given, but is not cross examined, and goes abroad, the Plaintiff may obtain an Order that the Deposition of the Witness should be published, in order that it may be read in Evidence on the Trial, and it will be admitted on the Trial ; for as the Defendant had had notice of the Time of the Examination he might have cross-examined at that time, or applied for further time for that purpose ; and it must be presumed, from his not having done either, that he did not wish to cross-examine (f).

If a Deposition *de bene esse* has been read at the hearing, it is of course, if any Issue is directed, to order it to be read on the Trial, notwithstanding an irregularity in the examination, which might have been objected at the hearing (g). The Order that *the Depositions shall be read at the Trial of an Issue is [*190 necessary, for otherwise they would not be evidence, being depositions before Issue joined (h).

Having stated the essential properties of a Bill of this nature, and the proceedings thereon, it may be proper to illustrate what has been said, by the mention of some cases on the subject ; and first, as to the title to the thing in question, or Interest in the Plaintiff necessary to support the Bill ; with respect to which, it has

(c) Comyn's Digest, 2 vol. 292.

(d) Sir N. Bacon's Rules, Wyatt's Prac. Reg. 72 and 73. 2 Ves. 337 ; and see Corbett v. Corbett, 1 Ves. & Bea. p. 335. Ormichund and Barker, 2 Eq. Abr. 402. In Harris v. Sir John Cotterell, Bart. Exch. 28 June 1808, MS. such publication was refused. S. C. 3 Meriv. 678.

(e) 2 Ves. 337 ; and see what Ch. Bar. Parker says, 2 Eq. Abr. 402.

(f) Cazenove and another against Vaughan, 1 Maule & Selwyn, p. 4.

(g) Gordon v. Gordon, 1 Swanst. 166.

(h) Gordon v. Gordon, 1 Swanst. p. 170.

been decided, that neither a Tenant in Tail in Remainder, nor his Issue, can file such a Bill to perpetuate the Testimony to the Marriage of the Tenant in Tail, for want of a *present* Interest (i). It has also been decided, that the next of kin of a Lunatic, though he may be in the most hopeless state, have not such an Interest as qualifies them to file such a Bill (k); nor will such a Bill lie during the life-time of the Lunatic to perpetuate the testimony of Witnesses to a Will made by him previous to his Lunacy (l); but a *vested Interest*, though the *least valuable* that can be conceived, gives a right to preserve testimony (m).

It has been determined, that a Plaintiff is entitled to perpetuate the testimony of Witnesses to an *unworn* Contract, notwithstanding his not offering to pay what is justly due (n). And Lord Hardwicke, has said, there is no certain distinction laid down, *191] where a *Man is forbid to perpetuate testimony as to personal demands against himself (o).

A Bill may be filed to perpetuate Testimony in many cases, where a Bill could not be brought for relief without waiving Penalties; as in *Waste*, or in the case of a *forged deed*, or in the case of *Insurances*, after Commissions to examine Witnesses beyond the Sea, as to fraudulent losses; though in many cases, such losses subject persons to a penalty, and are sometimes felonious (p.)

The Lord Keeper said, in *Gell and Hayward* (q), that he would not allow Examinations in *perpetuam rei memoriam*, for such trivial things as a *right of Common*, or of *Ways*, or *Watercourses*; or at least not till after a *Recovery at Law* (r), but this doctrine is too general. A Bill will lie to perpetuate *testimony* respecting a *right of Common and Way*, but if the charges in the Bill are too general, and not sufficiently descriptive of any particular right, a Demurrer will hold (s); for the Bill must set out the way exactly, *per et trans*, in the same manner as it ought to be set out in a Declaration at Law (t).

Such a Bill will lie to examine Witnesses to prove a *Modus* (u). So, to prove a promise, &c. which is to be performed after the death of A (x). It will lie also in aid of a legal title, and be- *192] fore an Action at *Law is brought; as where a Bill was

(i) Allan and Allan, MS. S. C. 15 Ves. 130.

(k) Lord Dursley v. Fitzhardinge, 6 Ves. 251.

(l) 1 Vern. 105. Sackville v. Ayleworth, and dicta to the same effect by Lord Eldon, MS.; see also Redead. Tr. Pl. 127, and cases there mentioned.

(m) Dursley v. Fitzhardinge, 6 Ves. 251.

(n) 1 Atk. 450. Earl of Suffolk v. Green; see also what Lord Hardwicke says in Chancey v. Tabourdin, 2 Atk. 293.

(o) 1 Atk. 450. Earl of Suffolk v. Green; see also what Lord Hardwicke says, in Chancey v. Tabourdin, 2 Atk. 293.

(p) 1 Atk. 450. Earl of Suffolk v. Green.

(q) 1 Vern. last Edition, p. 312.

(r) Ibid. p. 308. Pawlet v. Ingreay.

(s) 1 Ves. jun. 449. Cresset v. Mitton, S. C. 3 Bro. C. C. 481.

(t) Gell v. Hayward, 1 Vern. 312.

(u) 1 Vern. 184. Somerset v. Featherby.

(x) Com. Dig. tit. "Chancery, R."

filed against the East India Company and their Secretary, praying a Commission to examine Witnesses in India, and that the Defendants might discover by what authority the Plaintiff was dispossessed of a Lease for supplying Madras with Tobacco, the Plaintiff intended to bring an Action (y). In *Egerton and Moslyn* it was held, that before an Action brought, a Bill for perpetuating the testimony of Witnesses could not be supported (z); but in this case the Trespass was committed by a *known* Defendant, whereas in the former case the Bill was to discover by whom the Plaintiff had been injured.

Where Lands are devised by Will, and there is no occasion or opportunity to prove and establish it at Law, it is a very common practice to file such a Bill as this against the Heir at Law; for though by the same Will, *goods and chattels* are bequeathed, yet the proving the same in the Ecclesiastical Court, will be of no avail with respect to the *Lands* thereby devised. The Defendant having appeared and answered a Bill for this purpose, the parties proceed to Issue as in other cases, and then the Plaintiff examines all the Witnesses, if living, to the proof of the original Will, or proves the handwriting of such of them as are dead, which being done, and publication passed, there is an end of the Cause. After Publication of the Depositions of the Witnesses in these Cases, it is usual, in order the better to perpetuate their testimony, to enrol the Pleadings with the Commission, Interrogatories and Depositions, and afterwards to exemplify them under *the Seal of the Court, and such exemplifications become evidence in support of the title of the Devisee in all Courts of Law and Equity; and no other proof is necessary of such Copies than the production of them (a).

Devisees, however, filing a Bill to establish a Will, and carry the Trusts into execution, have no right to call upon persons who claim paramount to the Will, to litigate such claims (b).

With respect to the statement in the Bill of the *matter touching* which the Plaintiff is desirous of acquiring evidence, *Lord Eldon* has observed, that great danger may arise out of such Bills, and that the facts which the Plaintiff wishes to be examined should be *particularly stated* (c).

In regard to showing the *Interest of the Defendant to contest the Title of the Plaintiff in the subject*, it has been determined, that, to a Bill brought to perpetuate testimony as to the *legitimacy* of the Plaintiffs, who were Infants, and entitled to a Remainder in Tail, after an Estate for Life, against others in Remainder, a Demurrer, by those who were the seventh and eighth in Remain-

(y) 1 Bro. C. C. 469. *Moodalay* against *Morton*. Peake's Evidence, p. 30.

(z) *Ibid.* 470.

(a) *Gilb. Law of Evidence*, p. 19.

(b) *Devonsher v. Newenham*, 2 Sch. & Lefr. 199.

(c) *Bartlett v. Hawker*, MS.

der, on the ground that their Interests were too remote to justify their being made Defendants, was overruled (d).

Lord Eldon put a case, where, it seems, he thought a Demurrer would lie; as where there is an eldest son illegitimate, and a devise to him by his Father in Tail, who leaves the Reversion to *194] descend; and he *also has a Son by marriage, and a dispute has arisen; the eldest insisting he was not illegitimate; and the younger that the first marriage was to his mother; and he as Reversioner should file a Bill to perpetuate testimony: "I am not quite sure," says *Lord Eldon*, "that in such a case the elder might not say, he being in possession as Tenant in Tail, might suffer a Recovery and destroy the Reversion, and therefore Equity could not interfere" (e).

As to the Witnesses being old and infirm, it seems that a Witness is not, for the purpose of this Bill, considered old unless he is seventy years of age (f); but in one case an Order was made to examine a surviving Witness to a Will *de bene esse*, upon an Affidavit that the parties concerned lived in Virginia, and that the Witness was upwards of sixty years old, and greatly afflicted with the Gravel (g).

With respect to a previous investigation in a Court of Law, it may be observed, that a Demurrer will lie to a Bill of this kind if there is no impediment to the Plaintiff trying his Right at Law (h), unless where it is to preserve the testimony of Witnesses old and infirm, who may die before a Trial at Law.

A Devisee will not be allowed to examine Witnesses on such a Bill, to prove a Will against a purchaser without notice, until the Will has been established by a verdict at Law (i); and in such *195] case the purchaser *may protect himself by Plea (k), or Demurrer (l). But it is otherwise when the Party filing the Bill is himself in possession, for then he has no occasion to establish his right at Law. If, therefore, such Bill is filed by one out of Possession, having only a right to a fishery, a Demurrer will lie (m).

With respect to Costs in Bills of this kind, they are never given against the Defendant (n), and he is entitled to his Costs immediately after the commission is executed, provided he did not examine any Witness (o). So, if no Witnesses are ex-

(d) Lord Dursley v. Fitzhardinge, 6 Ves. 251.

(e) Lord Dursley v. Fitzhardinge, 6 Ves. 261. Allan v. Allan, MS. S. C. 15 Ves. 130.

(f) Fitzhugh against Lee, Ambler 65.

(g) Ibid.

(h) 1 Vern. 441. Parry v. Rogers, 1 Dick. 55. Cox v. Colley, Wyatt's Prac. Reg. 74. Philips v. Carew, 1 P. Wms. 117. Brandlin v. Ord, 1 Atk. 571.

(i) Bechinell v. Arnold, 1 Vern. 354; and see Redesd. Tr. Pl. 226.

(k) Bechinell v. Arnold, 1 Vern. 354.

(l) 1 Vern. 441. Parry v. Rogers.

(m) Prec. Ch. 531, 2; and see what is said in Mayor of York v. Pilkington, 1 Atk. 284.

(n) Clifton v. Orchard, 1 Atk. 610. The case in 2 Atk. 167, is not now the rule.

(o) Foulds v. Midgley, 18 Ves. 138. It is said in Wyatt's Pract. Reg. 151, that on these Bills costs are not given on either side, but that seems a mistake.

mined the Defendant is entitled to his Costs (*p*). Where a Bill is brought against an Heir at Law to perpetuate the testimony of Witnesses to the Will, though he by his answer neither confesses or denies its validity, but leaves the Plaintiff to make such proof of the due execution of it as he shall be advised, and though the Defendant *cross examines* the Witnesses, yet he is entitled to be paid his Taxed Costs; but if he examines Witnesses of his own as to the execution of the Will, he thereby makes use of the Plaintiff's Bill, to perpetuate testimony on his part, and is not, it seems, entitled to his Costs (*q*). And if in a Bill of this kind an Issue is directed at the instance of the Heir at Law, the Court has a discretion as to giving him his Costs (*r*).

**X. Bill of Discovery.*

[*196

Every Bill requiring an answer, is, more or less, a Bill of Discovery; but the Bill here meant, and to which that title is peculiarly given, is a Bill employed merely for the Discovery of facts in the knowledge of the Defendant, or of Deeds or Writings (*s*), or other things, in his custody or power, but praying no further or other Relief, or merely a Commission for the *Examination of Witnesses* (*t*), or the stay of proceedings at Law until the Discovery should be made (*u*).

This Bill is usually employed in the aid of the Jurisdiction of some other Court, (even of a *foreign Court* (*x*) if necessary,) to enable the Plaintiff to prosecute or defend an Action,—a proceeding before the Council,—or any other legal proceeding of a nature merely civil (*y*), before a Jurisdiction which cannot compel a Discovery on oath (*z*;) but the Court of Chancery has, in some instances, refused to give this aid to the Jurisdiction of very inferior Courts (*a*), and will not give a Discovery in aid of an arbitration (*b*). *This Bill lies in aid of proceed- [*197 ings in Chancery, in order to deliver the party from the necessity

(*p*) *Lecky v. Murray*, 1 Ball & Beatty, 391.

(*q*) 1 Sch. & Lefr. 317; and see 1 Ball & Beatty, 393.

(*r*) *Wilson v. Gwynne*, 1806, MS.

(*s*) On an action, Courts of Law, according to the modern practice, will order the Plaintiff to produce papers, &c. and give copies before the Defendant pleads, which in such case saves the delay and expense of a Bill in Equity. [*Clifford v. Taylor*, Taunton's Rep. 1 vol. p. 166.]

(*t*) See 1 Bro. C. C. 471.

(*u*) Redesd. Tr. Pl. 42.

(*x*) *Dek Ris v. Vallego*, mentioned

Redesd. Tr. Pl. 151, (3d Edit.) and see 2 Anstr. 467.

(*y*) *Lord Montague v. Dudman*, 2 Ves. 398. If a Bill is brought to aid, by a discovery, prosecution, or defence of any proceeding not merely civil in any other Court, as an indictment or Information, a Court of Equity will not compel a Discovery, and the defendant may demur. [*Ibid.*]

(*z*) 1 Atk. 288. 1 Ves. 205. 2 Ves. 451.

(*a*) Redesd. Tr. Pl. 42. See also 1 Ves. 205. *Earl of Derby v. Duke of Athol*.

(*b*) *Sic dict. Street v. Rigby*, 6 Ves. 821.

of procuring Evidence (c); Bills in such cases are in general what are termed Cross-Bills, and will be further observed upon hereafter (d). And it is observable, that wherever the assistance of a Court of Equity is required upon equitable circumstances, a *Discovery*, for instance, a Bill will lie for a *legal demand*, but in such case the Bill is usually retained, with liberty to bring an Action (e).

After an Order in Bankruptcy for liberty to bring an Action, with special directions for a production of Papers, and not to set up the Bankruptcy, a Bill of Discovery cannot be filed (f).

The Bill states that the matter touching which a Discovery is sought, the Interest of the Plaintiff and Defendant in the subject, and the Right of the former to require the Discovery from the latter (g).

With respect to Affidavits accompanying Bills of this description, the rule appears to be, that where a Party comes only for the discovery of a Deed he need not make oath of the loss of it, as he must do when he applies also for *Relief*; (1) for he is not allowed to translate the Jurisdiction without oath made of the loss of the Deed (h), and this is the constant distinction (i).

*198] *Though the Plaintiff has been convicted of Perjury, his affidavit, it seems, will be sufficient for the purpose of a Discovery (k).

(c) Lord Montague v. Dudman, 2 Ves. 398.

(d) See tit. "Cross Bill."

(e) See Buxton v. Sidebotham, 2 Ves. jun. 520, in note (a); see also Stevens v. Praed, 2 Ves. jun. 519. Wright v. Hunter, 5 Ves. 792; see also Barker v. Dacie, 6 Ves. 688.

(f) Cooke v. Marsh, 18 Ves. 209.

(g) See Redesd. Tr. Pl. p. 42.

(h) Godfrey v. Turner, 1 Vern. 247; see also 2 P. Wms. 546. Whitechurch v. Golding, and the cases there cited, Anon. 3 Atk. 17.

(i) Dormer v. Fortescue, 3 Atk. 132; and see Anon. 3 Atk. 17.—There are, however, some cases which seem to the contrary, such as Precedents in Chancery, 536, and 1 Vern. 59, Anonymous; where it was determined, that when a man exhibits a Bill for the discovery of a Deed, and prays in his Bill a discovery only, an oath must be made that the Plaintiff has lost the Deed; see also Bunb. 46, and Finch's Rep. 239. The able Editor of the last Edition of Vernon, in his note to the case in 1 Vern. 59, approves the doctrine as stated

above; but in his note to the subsequent case in 1 Vern. 180, Anonymous, he seems to adopt the case in Precedents in Chancery, 536. In Gilbert's Forum Romanum, p. 52, the distinction is stated to be, "That if a Bill be brought for discovery of writings in general, no Demurrer can be to such Bill for want of an affidavit annexed; but if a Bill be brought for the discovery of a particular Deed or Bond, for which there is a proper remedy at Law, then they must annex such affidavit to the Bill, though it be but for discovery, because otherwise the answer would be but an unnecessary expense."—Hinde seems to have copied this statement of Gilbert. See Hinde's Chan. Practice, 1st Vol. p. 143. Indeed the Books of Practice have shown little discrimination on the subject; but the true distinction seems to be as above stated, and certainly it accords with the old practice, as appears by "The Clerk's Tutor in Chancery," Introduction, p. 41. See also 8 Vin. Abr. p. 550.

(k) See Bowyer v. M'Evey, 1 Ball & Beatty, 565.

(1) But if relief is sought, as well as discovery, on the ground of a lost deed, there must be an affidavit of the loss. *Livingston v. Livingston*, 4 Johns. Ch. Rep. 294.

Where the Discovery is *immaterial* (l), or where on the face of the Bill it appears there can be no remedy, a Discovery would be merely impertinent, and is not enforced (m); but where the Bill avers that an Action is brought, or where the necessary effect in Law of the Case stated by the Bill, appears, to be that the Plaintiff has a right to bring an Action (n), he is entitled *to a Discovery to aid that Action so alleged to be brought, [*199 or which he appears to have a right and intention to bring (o); but it has never been laid down, that a person can file a Bill, not venturing to state who are the Persons against whom the Action is to be brought, nor stating such circumstances as may enable the Court, which must be taken to know the Law, and therefore the liabilities of the Defendants, to judge, but stating circumstances, and avowing that he has a right to an Action against the Defendants, or some of them (p). (1) Upon these Principles, a Demurrer was allowed to a Bill which did not allege with sufficient certainty *by whom* the duties claimed by the City of London under Letters Patent, in respect of which a Discovery was prayed in aid of an Action, were payable (q). If the Bill had stated, that by reason of combination it was so managed that the Plaintiff could not bring an action, and therefore there ought to be an Account of the Fees in a Court of Equity, it might have been sustained (r).

A Bill of Discovery cannot be demurred to on the ground

(l) Redesd. Tr. Pl. 155, 6. 3d Edit. and the cases there mentioned; and see 1 Bro. C. C. 96, which is said by the Lord Chancellor to be "the first instances of a Demurrer for immateriality." Ibid. p. 97, *sed qua.* And see Baker v. Pritchard, 2 Atk. 387. Dinley v. Dinley, Ibid. 394; and 2 Ves. Jun. 396. 1 Anstr. 82.

(m) See Rondeau and Wyatt, 2 Bro. C. C. 154. Finch, 36. 44. Redesd. Tr. Pl. 151.

(n) It is not necessary that an Action

should be brought previous to a bill of Discovery in support of an Action; see Moodaly v. Moreton and East India Company, 2 Dick. 34. S. C. 1 Bro. C. C. 468.

(o) In Finch v. Finch, 2 Ves. 234, it was said a Bill of Discovery does not lie to create evidence for a future cause; but see 1 Bro. C. C. 469. 2 Dick. 652.

(p) Mayor and Citizens of London v. Levy, 8 Ves. 404.

(q) Ibid. 8 Ves. 398.

(r) Ibid. 8 Ves. 405.

(1) On a bill of discovery, for matters material to the plaintiff's defence in a suit at law against him, the nature of the defence must be stated. And the bill ought to state enough to enable the court to discern that the ends of justice require its interposition; and the facts too, sought to be discovered, should be so far stated as to show their pertinency and relevancy. *McIntyre v. Manchar*, 3 Johns. Ch. Rep. 45. S. C. on appeal, 16 Johns. Rep. 592. Vide *Gelston v. Hoyt*, 1 Johns. Ch. Rep. 543. *Seymour v. Seymour*, 4 Johns. Ch. Rep. 409. Where the facts sought to be discovered, depend on the testimony of witnesses, and a court of law can compel their attendance, chancery will not interfere. And it seems, that a bill for a discovery and an injunction cannot be sustained, merely to procure such admissions by the party, as might be used in mitigation of damages, in an action of trespass, at law, except in very special cases. *Gelston v. Hoyt*, *ut supra*. It seems, that where the bill is for a discovery merely, and there is a demurrer, the court will not examine so nicely into the materiality of the matters to be discovered. *Seymour v. Seymour*, *ut supra*.

that the Party against whom it is filed has an Interest against the Plaintiff (s).

So a Plea of Bankruptcy to a Bill by Bankrupts, seeking a Discovery in aid of their defence to an Action, and praying payment of the balance found due to them on the taking of the Account^{*200} counts, and ^{*}an Injunction in the mean time, has been over-ruled (t).

It has been held, that an Heir stands in no need of, nor can he call for, a Discovery of Writings, unless he claims under some concealed Deed of *Entail* (u); but *Lord Hardwicke* carried the Rule farther, and held, that every Heir at Law has a right to a Discovery, by what means, and under what Deed he is disinherited, if by his Bill he states the particular facts on which he founds his claim (x); but in such case, it seems, the Defendant may plead, in bar of the Discovery, that the Plaintiff is *not Heir* (y); ^{*201} and if the ^{*}Heir files a vexatious Bill against a Devisee, it will be dismissed with Costs (z).

Nothing is better established in Courts of Equity than that where a Title exists at Law, and in Conscience, and the effectual assertion of it at Law is unconscientiously obstructed, relief will be given in Equity (a). If there be a term for years, or any other temporary bar is an impediment to Justice, it may be put out of the way (b); but though an Heir out of Possession is entitled to a Discovery of Deeds necessary to support his legal

(s) Per Lord Mansfield, in *Cox and others*, mentioned 10 East 399.

(t) *Lowndes and another v. Taylor and another*, 1 Mad. Rep. 423, confirmed on appeal to the Lord Chancellor.

(u) See 3 P. Wms. 295. *Tanner v. Wise*.

(x) *Harrison v. Southcote*, 1 Atk. 540.

(y) See post, 2d vol. tit. "Plea." See *vid. contra*, *Gun and Prior*, 2 Dickens, 657; but more at length in note to *Forrest's Rep.* p. 88, and in 1 Cox, 197; and see *Delorne v. Hollingsworth*, 1 Cox, 421, 2; see also *Newman and Wallis*, 2 Bro. C. C. 143. Lord Thurlow seemed to doubt whether he had determined that case rightly; see *Hall against Noyes*, 3 Bro. 489. *Forrest's Reports*, p. 85. Lord Redesdale, in his *Treatise of Pleading*, observes, that if the Plaintiff by his Bill states himself to have an interest which entitles him to call on the Defendant for a Discovery, though, in truth, he has no such Interest, the Defendant may by a plea protect himself from making the discovery, as it may involve him in difficulty and expense, and perhaps may be prejudicial to him in other cases. Thus, says he, if a Plaintiff states himself to be Heir or Ad-

ministrator of a person dead intestate, and in that character seeks a Discovery from a person in possession of property which did belong to the deceased, of his title thereto, or of the particulars of which it consists, the defendant may plead that another person is heir or personal representative, or that the person alleged to be dead is living. *Redesd. Tr. Pl.* p. 223, 2d Edition. Mr. Foublanque, in his note to "The Treatise on Equity," 2d vol. p. 484, n. (e.) has adopted this doctrine; and the *Pract. Reg.* p. 326, Wyatt's Edit. supports it, and so, also, does a case in *Finch*, p. 36; but it is deserving of consideration, whether the case of *Gun v. Prior*, already alluded to in *Forrest*, ought not to be considered as correcting the generality of the propositions they enforce; and, indeed, in the last edition (3d.) of Lord Redesdale's Work, p. 188, he says, "the subject seems still to require further consideration." See 11 Ves. 283, 296, and 303, and the cases there cited, and *Benmes on Pleading*, p. 120, &c.

(z) *Seal v. Brownton*, 3 Bro. C. C. 214.

(a) *Hopkins v. Bond*, 1 Sch. & Lefr. 429.

(b) *Ibid.* 431.

Title, or to have terms put out of his way which may impede his Recovery at Law; he cannot file a Bill merely for possession of the Estate and of the Title Deeds (c); and though the Bill states there are out-standing Terms, if the Defendant pleads there are no out-standing Terms, that is a good Plea; for there being no obstacle to the Plaintiff's proceeding at Law, there is no ground for a Bill in Equity (d). There is no case in which the Heir has claimed merely as Heir, an account, not stating any impediment to his recovery at law (e).

The Title of an Heir is a legal one. If he cannot set aside a Will disinheriting him, he has nothing to do with the Deeds, unless, perhaps, in the case of a Peer disinherited by his Ancestor (f); nor is he, it seems, entitled to a Discovery unless there are encumbrances *standing in the way, which the Court [*202 would remove to enable him to assert his legal right (f). It is not so with an *Heir in Tail*; a will is no answer to him; he has, beyond the general right, such an Interest in the Deed creating the Entail, that the Court, as against the person holding it back, would compel the production of it (g).

If a Plaintiff has set forth a Title in contradiction to the Defendants, he has no right, generally speaking, to look into the Defendant's Title (h); but if the same Deed constitutes, in part, the defence, and in part the Plaintiff's Title (i); if, for instance, the Bill charges, that by producing the Deed it will appear that the person under whom the Defendant claims is only Tenant for Life, some answer must be given; and a statement of what a Defendant *barely knows and believes* is not sufficient, but he must state *how the fact is* by the Deed. If the Defendant pleaded he was a Purchaser for a valuable consideration it would be different (k).

Where a Bill prayed that the Defendant might state the particulars of his Pedigree as Heir, and of Births, Baptisms, Marriages, &c. a Demurrer was allowed (l); a Plaintiff having no right to a Discovery unless he lays a foundation for it (m).

It seems that one claiming under a voluntary Deed *can- [*203 not file a Bill of Discovery as against the Heir, to discover Deeds in his Possession, but the Court will leave the party to Law (n).

(c) *Crow v. Tyrell*, 3 Madd. Rep. 182, 3.

(d) *Armitage v. Wadsworth*, 1 Madd. Rep. 189.

(e) *Pulteney v. Warren*, 6 Ves. 89.

(f) See *Earl of Suffolk v. Howard*, 2 P. Wms. 176; but see the observations on that case in *Hylton v. Morgan*, 6 Ves. Jun. 296.

(g) *Tanner v. Morse*, Trin, 7 Geo. 2 MS. *Lady Shaftsbury v. Arrowsmith*, 4 Ves. 71; and see *Jones v. Jones*, 3 Me-

riv. 172; and *Crow v. Tyrell*, 3 Madd. Rep. 179.

(g) *Lady Shaftsbury v. Arrowsmith*, 4 Ves. Jun. 71.

(h) See 13 Ves. 251.

(i) *Ibid.* 252.

(k) *Stroud v. Deacon*, 1 Ves. 38; and see *Hall v. Daniel*, 2 Vern. 463, and the cases in the note.

(l) *Ivy v. Kekewick*, 2 Ves. Jun. 679.

(m) *Renison v. Ashley*, 2 Ves. Jun. 459.

(n) *Anon.* 2 Ch. Cas. 133.

Any Person in possession as Tenant, or otherwise, may file a Bill for a Discovery of the Title of one bringing an Ejectment against him, even though he is a wrong-doer against every body (y).

Such a Bill lies for the discovery of Goods put on board a Ship, though insured at a sum certain, *Interest or no Interest*; for the value of the Goods saved ought to be deducted out of the sum to be paid for Insurance (z).

It has been holden, that a Person may be obliged to discover a Case which he had stated to his own Counsel for his opinion, and the facts stated in the Case (a).

*207] *So a Bill lies for the discovery of *Assets*, to enable the Plaintiff to bring an Action at Law against an Executor or Administrator; but in this case the Bill must charge, that Assets or Goods of the Testator came to his hands (b).

So for a discovery of Wine imported, for which *Prisage* is due (c); or against an *Auditor* for a Discovery whether the particular by him made is true, though he is *finable* for the deceit to the King, if false (d).

If a Defendant has in conscience a right equal to that claimed by a Person filing a Bill against him, though not clothed with a perfect legal Title, a Court of Equity will not compel him to make any Discovery which may hazard his Title; and if the matter appears clearly on the face of the Bill, a Demurrer will hold (e).

Such a Bill, therefore, does not lie to compel a *Purchaser for a valuable Consideration without notice* of the Plaintiff's Title, to make a Discovery which may affect his own Title (f); and this is "an infallible Rule" (g); for such Purchaser is not bound in conscience to assist the right Owner in the legal recovery of the subjects purchased under such circumstances (h). And the Assignee of a Purchaser for a valuable consideration without notice is entitled to the same protection (i). Upon the same *208] principle a *jointress may, in many cases, demur to a Bill filed against her for a discovery of her Jointure Deed, if the Plaintiff is not capable of confirming, or by his Bill does not offer to confirm, the Jointure, and the facts appear sufficiently on the face of the Bill, though, ordinarily, advantage is taken of this

see also 1 Vern. 307. *East India Company v. Evans*, and expressly to the same effect, *Ibid.* 407. *Marsden v. Punshall*.

(y) 1 Ves. 242. *Metcalf v. Harvey*.

(z) 2 Vern. 716.

(a) *Stanhope v. Roberts*, 2 Atk. 214.

(b) 1 Ch. Ca. 226.

(c) *Hard.* 138.

(d) *Ibid.*

(e) *Redesd. Tr. Pl.* 163.

(f) 2 Chan. Cas. 73.

(g) *Jerrard v. Saunders*, 2 Ves. jun. 454; see also the cases on this subject collected, 8 Vin. Abr. 546, and what Sergeant Maynard says, 1 Ventr. 198. *Snelling v. Squib*, 2 Cha. Cas. 47. *Per-rat v. Ballard*, 2 Cha. Cas. 72. *Abery v. Williams*, 1 Vern. 27.

(h) *Hoare v. Parker*, 1 Cox, 227.

(i) *Sweet against Southcote*, 2 Bro. C. C. 66. *Lowther against Carlton*, 2 Atk. 139. 242. *S. C. Temp. Talbot*, 186. *Barn.* 358.

defence by way of Plea (*k*). On this ground, a Mortgagee may protect himself from a Discovery of his Title Deeds, except the Purchase Deed (*l*), although the Plaintiff brings his Bill to redeem ever so strongly (*m*); but to this Rule there is an exception in Cases where a *Douress* claims a discovery in respect of her Dower (*n*). Such a Bill will not lie to discover the *Tenant to a Præcipe* on a voluntary Conveyance (*o*). Nor will it lie to discover who is *Tenant of the Freehold*, for the purpose of bringing a *Formedon*, for there are ways to know it without (*p*). But such a Bill lies for the discovery of a Tenant to an Estate, whereby to ground an Action of *Dower* (*q*), or proceedings for a *Partition* (*r*). It does not lie in aid of the Jurisdiction of the *Eccllesiastical Court*, because that Court is capable of enforcing a *Discovery* (*s*). *Nor does it lie to discover whether a [*209 particular person *exists*, or *where* he is, to enable the Plaintiff to make him a party to a Bill (*t*).

In several Cases it has been held, that after a *Verdict*, such a Bill does not lie in support of a fresh Action. (1) As where the Plaintiff, for want of being able to prove a Letter wrote to him by the Defendant, filed a Bill of Discovery to clear up the matter, the Defendant *pleaded* the *Verdict*, and that the effect of the Letter was given in Evidence at the Trial, and also *demurred* for want of *Equity*, and the Plea and Demurrer were allowed (*u*). So in another Case, where Money was paid in part, for Goods, but the Receipts were lost, and the whole was recovered at Law; and a Bill of Discovery was then filed, the *Lord Keeper North* said, "you come too late for a *Discovery* after a *Verdict*" (*x*).

But it seems that after a Trial a Bill might be filed to compel the production of documents which parties refused to produce at the Trial (*y*); but a Bill, merely stating a Verdict has passed against the Plaintiff, and praying a Discovery, without imputing

(*k*) Redesd. Tr. pl. 162, who cites 2 Ves. 450. 6 Ves. 39; see also Ventr. 198. *Towers v. Davis*, 1 Vern. 479. *Lomax v. —* cases temp. King. 4 Ford v. Peering, 1 Ves. jun. 76.

(*l*) Redesd. Tr. Plead. 219.

(*m*) *Senhouse v. Earl*, 2 Ves. 450.

(*n*) *Williams against Lambe*, 3 Bro. C. C. 264.

(*o*) *Sherborne v. Clerk*, 1 Vern. 273. *Stapleton v. Sherrard*, Ibid. p. 213. S. C. Eq. Cas. Abr. 76.

(*p*) *Stapleton v. Sherrard*, 1 Vern. 212. *Sherborne v. Clerk*, Ibid. p. 273; see also Vin. Abr. 8 vol. p. 537. Ibid. 654.

(*q*) Toth. 84.

(*r*) Hard. 139.

(*s*) *Dun v. Cotes*, 1 Atk. 289. 8 Vin. Abr. 537; see also *Earl Derby v. Duke of Athol*, 1 Ves. 205, and *Anonymous*, 2 Ves. 451.

(*t*) *Chancey v. Tabourdin*, 2 Atk. p. 393; but see 1 Vern. 93, cited Redesd. Tr. Pl. 227.

(*u*) Ch. Cases, 65. Vin. Abr. 8 vol. 542.

(*x*) *Barbone v. Brent*, 1 Vern. p. 176.

(*y*) *Field v. Beaumont*, 1 Swanst. 209.

(1) Vide *Duncan v. Lyon*, 3 Johns. Ch. Rep. 351.

a violation of the duties arising from the relation between the Parties, could not be sustained (x).

In general, it seems that the ground for a Bill to obtain a new Trial after Judgment, in an Action at Law, must be such as would entitle the Party to file a Bill of Review of a Decree in a *210] Court of Equity, upon *discovery of new matter (a). Bills, however, of this description are discountenanced (b).

A Barrister is not bound to discover as to Writings he has seen, nor any thing he knows in a Cause as Counsellor (c); but if any thing comes to his knowledge before he was a Counsellor, or upon any other account, he is obliged to answer (d).

In one case it was doubted if a thing were revealed under the condition of secrecy to one not a Barrister, whether or no he would be obliged to answer (e); but it has been holden that an Arbitrator is not bound to make a disclosure (f).

So an Attorney cannot be obliged to discover matters relative to the Estate and Affairs of his Client (g), but he is compellable to answer whether there are Deeds, and also where the same are, and to whom they are delivered, and when he last saw the same, and in whose custody; but not to produce or discover the dates or contents of them (h). So he may be examined as to his Client's execution of a Deed in his presence (i). It is said a Trustee may and ought to produce writings (k).

Where several are Partners in an unlawful or clandestine Trade, and one of them brings a Bill of Discovery against the others, they cannot plead that their Answer may subject them to the penalty of an Act of Parliament; for by their going on *211] in such Trade *they are considered as having waived the objection of unlawfulness as between themselves (l).

The Court of Chancery will also aid a remedial Law, and not suffer its own notions to be made use of to elude any beneficial law; as, if a Trustee does by Fraud and Combination with the Cestui que Trust endeavour to evade any penal law, as the stat. of *Simony*, &c. under the pretence that a Trust is only cognizable in Equity, and that Equity should not assist a Penalty or Forfeiture, it will compel a Discovery (m).

Although both Plaintiff and Defendant may have an interest in the subject to which the Discovery required is supposed to relate, yet there may not be that privity of title between them

(x) Ibid. and see *Whitmore v. Thornton*, 3 Price, 231.

(a) Redesd. Tr. Pl. 106, 3d edit. who cites 1 Ch. Cas. 43, 2.

(b) Ibid. 105, 6.

(c) *Bulstrode v. Letchmere*, 2 Freeman 5. 1 Cha. Cas. 27.

(d) Ibid.

(e) Ibid. 5.

(f) 1 Cha. Cas. 277. S. C. cited Redesd. Tr. Pl. 106, 2d edit.

(g) *Finche's Rep.* 82.

(h) Ibid. 259. S. C. 8 Vin. Abr. 548.

(i) 2 Ves. jun. 180. 1 Sch. & Lefr. 226.

(k) 1 Ventr. 197.

(l) *Gilbert's Eq. Rep.* 186. 8 Vin. Abr. 540.

(m) *Eq. Ca. Abr.* 131. 8 vol. Vin. Abr.

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which can give the Plaintiff a right to the Discovery. Thus, where a Bill was filed by a Person claiming to be Lord of a Manor, against another Person also claiming to be Lord of the same Manor, and praying, among other things, a Discovery in what manner the Defendant derived Title to the Manor, the Defendant demurred, because the Plaintiff had shown no right to the Discovery, and the Demurrer was allowed (m).

So where a Bill was filed by a Person claiming under a grant from the *Duchy of Lancaster* to be Bailiff of a Liberty within the Duchy, with a right to all waifs, estrays, and other casualties within the Liberty, and all fees, and all perquisites respecting the same, against the owner of an Inn in the Liberty, and his Tenants, alleging that the Inn-yard had been used as a common *Pound within the Liberty, for all waifs, and strays, [*212 and casualties; and that the Tenants under demise from the Owner, had seized and taken all waifs, and strays, and other casualties, and received the fees and perquisites thereon; and required the Owner to discover how he derived Title thereto, and what Leases or Demises he had made thereof; a Demurrer to the Discovery was allowed. In general, where the Title of the Defendant is not in privity, but inconsistent with the Title made by the Plaintiff, the Defendant is not bound to discover the Evidence of the Title under which he claims. And therefore, on a Bill filed by an Heir *ex parte materna*, against a general Devisee and Executor, who had completed, by Conveyance to himself, a Purchase of a Real Estate contracted for by the Testator after the date of his Will, alleging that there was no Heir *ex parte paterna*, but that the Devisee set up a Title under a Release from his Father, as Heir *ex parte paterna* of the Testator, and praying a Conveyance to the Plaintiff, and seeking a Discovery in what manner the Father claimed to be Heir *ex parte paterna*, and the particulars of the Pedigree under which he claimed, a Demurrer to that Discovery was allowed (n).

It appears to be an established Rule, that (except in the case of Corporations (o), who, as they do not answer on Oath, the Answer would not be Evidence, and therefore a Clerk of the Corporation is allowed to be made a Defendant) (p); a mere Witness cannot *be made a Defendant to a Bill of this description (q); and therefore, where a Bill was brought for a Discovery in aid of an Action, a Demurrer was, on this ground, allowed; though the Discovery would probably have proved more effectual than the Examination at Law; and though there

(m) Redesd. Tr. Pl. 154, 3d edit.

(n) Redesd. Tr. Pl. 154.

(o) Wych v. Meal, 3 P. Wms. 310. Anon. 1 Vern. 117. 7 Ves. 289; and see Le Texier v. Margravine of Anspach, 15 Ves. 159. S. C. MS.

(p) 1 Vern. 117. 3 P. Wms. 310. 1

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Bro. C. C. 469. 14 Ves. 245.

(q) See 2 Vern. 380. Plummer v. May, 1 Ves. 426. Finch v. Finch, 2 Ves. 493. Cookson v. Ellison, 2 Bro. C. C. 252. Cartwright v. Hateley, 1 Ves. jun. 292.

Relief, if a *Demurrer*, or a *Plea* (r), will hold to the Relief prayed, the Defendant cannot have the *Discovery* (s). And it seems, if the Bill prays *Relief*, as well as a *Discovery*, and the *Discovery* is auxiliary to the Relief, a *Demurrer* to the *Discovery* alone will not hold (t).

Upon a Bill praying nothing but a *Discovery*, it has been held the Defendant is entitled to Costs (u), as between Attorney and Client (x); but Mr. *Justice Buller* thought the Rule thus laid down was *too general*, and was of opinion that if the Plaintiff is entitled to the *Discovery*, and goes first to the Defendant to ask for the Accounts he has in justice a right to, if the *217] Defendant refuses, and the Plaintiff is *thereby compelled to file a Bill for a *Discovery*, he ought not to have Costs; but if the Plaintiff files his Bill without trying first to get the *Discovery* in that way in which Men acting with each other ought first to ask their rights, he ought to pay Costs (y). In a Case at Law, the Counsel complained of the hardship of a Plaintiff in Equity being obliged to pay the Costs of a *Discovery*; upon which *Lord Kenyon* observed, that he had once heard *Lord Mansfield* say, he thought in such a Case the Court of Law ought to allow the Costs paid to the Defendant in Equity, as Costs at Law; that he was struck with the propriety of the observation, and thought it would be a good rule to be adopted (z).

If the Defendant puts in his Answer in the Vacation, and no exception is taken to it in the first eight days of the succeeding Term (a), he may then, but not before, move for an order for payment of the Costs of the *Discovery*; so that it is not quite accurate to say (b), that the moment the Answer comes in, the Defendant must be paid all the expense he has been at. On a Bill of *Discovery* the Plaintiff pays not only the Costs of the Answer, but all Costs occasioned by resisting Motions made in the Cause by the Plaintiff (c).

Where a Bill prays a *Discovery*, and a commission to examine Witnesses, the practice is settled to be, *that the Defendant is not entitled to move for his Costs till the return of the commission; and even then the Defendant will not have his

(r) *Sutton v. Earl Scarborough*, 9 Ves. 71. sed vid. *Street v. Rigby*, 6 Ves. 819.

(s) 1 Ves. & Bea. 539. *Jones v. Jones*, 3 Meriv. 175; and see post.

(t) *Forest's Rep.* in the Exchequer, 129.

(u) *Simmonds v. Lord Kinnaird*, 4 Ves. 746.

(x) *Cartwright v. Hately*, 1 Ves. jun. 293.

(y) *Weymouth v. Boyer*, 1 Ves. Jun. 416; see also what is said 2 Ch. Cases;

and I have heard Lord Eldon approve this doctrine.

(z) *Grant v. Jackson and others*, Peake's N. P. cases, p. 203.

(a) *Hewart v. Semple*, 5 Ves. 86, so stated by counsel, and, seemingly assented to by the Chancellor; and see *Redesd. Tr. Pl.* 164.

(b) See *Hindman against Taylor*, 9 Bro. C. C. 11.

(c) *Noble v. Garland*, 1 Madd. Rep. 344.

Costs if he examines Witnesses in *chief*, instead of confining himself to a Cross-examination (*d*).

If after the Defendant has answered, the Suit becomes abated, it cannot be *revived* (*e*). Where, therefore, the Plaintiff was a *feme sole* when she filed her Bill of Discovery, and afterwards married, whereby the Suit *abated*, the Suit, it was holden, could not be revived for Costs—a hard determination, reluctantly followed by Lord Eldon (*f*).

The Defendant cannot move to dismiss such a Bill as this for want of prosecution (*g*), for the Cause ends with the Answer (*h*): and in a case where such a Bill was improperly brought to a hearing, the question was, whether the Bill should be *dismissed*, or the Cause *struck out of the Paper*, and his Honour took the latter course, such a Bill never being *dismissed*; the words of a dismissal being, “The Court seeing no cause to *relieve* (*i*).”

II. *Bills Quia Timet*.

The denomination of Bills *Quia Timet* was borrowed, probably, from the Title of some ancient Writs at the Common Law; for, as Sir Edward Coke observes, “there be six Writs in Law that may be *maintained *quia timet*, before any molesta- [*219 tion, distress, or impleading, as, 1. A Man may have his Writ or mesne before he be distrained; 2. A *Warrantia charta*, before he be impleaded; 3. A *Monstraverunt*, before any distress or vexation; 4. An *Audita querela*, before any execution sued; 5. A *Curia claudenda*, before any default of Enclosure; 6. A *Ne injuste vexes*, before any distress or molestation. And these,” says Coke, “be called *brevia anticipantia*, Writs of Prevention” (*k*).

When a Person is apprehensive of being subjected to a future inconvenience, probable, or even possible, to happen, or be occasioned, by the neglect, inadvertence, or culpability of another; or where any property is bequeathed to one, after the death of another in existence, and which the former is desirous of having secured safely for his use, against the effects of any accident, which may happen to it previous to the accruing of his Possession, in either of these cases a Bill of the above description may be exhibited, which in the one instance will quiet the Party's apprehensions of future inconvenience, by removing the causes which may lead to it; and in the other, will secure for the use of the Party, the property, by compelling the person in

(*d*) Anonymous, 8 Ves. 70; see also *Bashbury v. —*, 9 Ves. 103.

(*e*) Gould v. Barnes, 1 Dick. 133.

(*f*) Dodson v. Juda, 10 Ves. 31.

(*g*) Woodcock v. King, 1 Atk. 286. Mos. 186. pl. 95.

(*h*) 3 Bro. 10.

(*i*) See on this subject *Hodgson against Dand*, 3 Bro. C. C. 475.

(*k*) Co. Litt. 100; and see 7 Bro. P. C. 125. Toml. Ed.

the present possession of it, to guarantee the same by a proper security, against any subsequent disposition, or wilful destruction (*l*).

Wherever a demand is made upon Assets in respect of a demand, certain, but *payable at a future time*, (a Legacy or a Mortgage for instance,) the person *entitled thereto may call upon the Executor to secure it for his benefit, and set a sum apart for that purpose; "nor is there," said *Lord Hardwicke*, "any more useful part of the Jurisdiction of Court in the Administration of Assets (*m*)."

In a Case decided by *Sir Thomas Clarke*, a Bill was filed by a Legatee for the security of a Legacy which the Defendant, an Executor, was to pay at the end of Ten Years after the Death of the Testator; and the prayer of the Bill was. that the Defendant might admit Assets, and give security, or pay the Money into the Bank; and though no particular reasons were assigned, such as wasting Assets, or Insolvency in the Defendant (*n*), a Decree was made that the Defendant should pay the Money into the Bank, and he should have the Interest in the mean time; and that at the end of the Ten Years the Principal should be paid to the Plaintiff (*o*).

So, in a Case, where a Legacy was left to one to be paid at twenty-four, the Plaintiff being only twelve years old, the Father filed a Bill to invest the Legacy in the Funds; and so it was decreed; though it was at the same time declared that the Plaintiff was not entitled to the Money till twenty-four (*p*).

In like manner, where 2000*l.* was left to the Testator's Daughter at twenty-one, and in default, to her Child, and if no *221] Child, to one *Mills*; a Bill was filed *to secure the Fund; and the Court held, that a Party so circumstanced was entitled upon such Bill to have part of the Personal Estate secured for the Legacy (*q*).

The doctrine seems to be the same, whether the Legacy be payable at a *fixed*, or at a future, *contingent* day; as, where a Legacy was left to a female Infant to be paid at twenty-one or Marriage, with Interest at four per cent., but if she died before, to sink into the Residue: on a Bill filed, the Court ordered the Legacy to be paid into the Bank, in order to secure the same, and if greater Interest than 4*l.* was made, it should be for the

(*l*) Analysis of the Practice of the Court of Chancery, p. 43. Hinde's Prac. 128.

(*m*) Johnson v. Mills, 1 Ves. 283.

(*n*) Some such reason seems to have been assigned in the earlier cases; see 1 Cha. Cases 121.

(*o*) Ferrand against Prentice, Amb. p. 273; more fully stated by Lord Thurlow, in Green and Pigot, 1 Bro. C. C. 105.

(*p*) Walker and Cooke, 15 Feb. 1781, cited by Lord Thurlow, 1 Bro. 105.

(*q*) Johnson v. De la Creuze, 17th July 1749, cited by Lord Thurlow, in Green and Pigot, 1 Bro. 105, and mentioned in Ferrand against Prentice, Amb. p. 273. see also Studholme and Hodgson. 3 P. Wms. p. 299. Pierce v. Taylor, Ibid. 108.

benefit of the Child ; for if it produced less Interest, the Executor would not be obliged to make up the deficiency (r). In this case, also, there was not the least surmise of any danger of losing the Legacy from the circumstances of the Defendant (s).

In another Case, where the Testator had given the Plaintiff 15,000*l.* to be paid at twenty-one, or Marriage, with Interest in the mean time, but if she died before, to sink ; the Master of the Rolls thought the Legacy must be appropriated ; and he decided accordingly (t). It must be observed, however, that in cases of this description the Court will not interfere to secure the Fund upon the application of a Person who does not show any Title (u).

*Where one by Will gave an *Annuity* out of his per- [*222 sonal Estate, and a Bill of this kind was filed, the Master of the Rolls observed, “since the Executor has by his Answer submitted it to the Court, whether he should give any Security, and appears to have expressed himself in words threatening to defeat the Annuity, let the Master see a sufficient part of the personal Estate set apart, and assigned to a Trustee, in trust, to secure the Annuity (x).” And where there has been no such submission by the Answer, or any threats, the Court has in like manner interfered (y).

Other cases where Bills of this description have been held proper are also to be found in the Reports.

Thus, where *A.* was entitled to the use of Goods, and a Library for Life, with Remainder to the Plaintiff's Wife, who died, the Plaintiff, as her *Administrator*, brought a Bill of this description to have the Goods, &c. secured to him after the death of *A.*, and a Decree was made accordingly (z).

It seems, however, according to the observation of *Lord Thurlow*, that the cases as to a Tenant for Life giving security for the Goods, have been overruled, and the Court now demands only an *Inventory*, which, he observes, is more equal Justice, and that there ought to be danger in order to require a Security (a).

Originally there could be no limitation over of a *Chat- [*223 tel, and a gift for life carried the whole Interest. Afterwards, in a Case before *Lord Somers* (b), a distinction was taken between

(r) *Green against Pigot*, 1 Bro. 335, 6. Rous v. Noble, 2 Vern. 249. 105, and see *Cary v. Askew*, 1 Cox, 244 ; but see *Palmer v. Mason*, 1 Atk. 505. S. C. 1 Cha. Cas. 121.

(s) See S. C. 2d vol. Dick. Rep. 586. (z) *Bracken and Bentley*, 1 Ch. Rep. 110. S. C. 1 Eq. Cas. Abr. 78. pl. 1.

(t) *Carey against Askew*, 2 Bro. C. C. 58. (a) *Foley against Burnet*, 1 Bro. C. C. 279. *Lecke v. Bennet*, 1 Atk. 471. *Bill v. Kynaston*, 2 Atk. 82.

(u) *Browne against Dudbridge*, 2 Bro. C. C. 321. (b) *Hyde and Parratt*, 1 P. Wms. p. 1 ; and to that effect are the subsequent cases, 1 P. Wms. p. 500, and 651 ; and see *Randall v. Russell*, 3 Mc-

(x) *Batten v. Earnley*, 2 P. Wms. p. 163. riv. 195.

(y) See *Slanning v. Style*, 3 P. Wms.

the *Use* and the *Property*, which has since been adopted. If, however, there is a specific gift for life, of things *quæ ipse non consumuntur*, such as Corn and Hay, it operates as a gift of the *Property*, and there cannot be a Limitation over after a Life Interest in such articles. If included in a residuary Bequest for Life, they must then be sold, and the Interest enjoyed by the Tenant for Life (c).

Where a Bill *Quia Timet* was filed to deliver up an Apprentice's Bond and Indentures, he being out of his Time, it was ordered, that the Defendant should either bring his Action within a Year, or deliver up the Bond and Indentures; for if it were at the Master's choice to stay as long as he pleased, he would perhaps stay till the Apprentice's Witnesses were dead (d).

So, also, the *Lord Keeper North* thought that if *A.* is bound for *B.* and has a counter Bond from *B.*, and the money is become payable on the original Bond, Equity will compel *B.* to pay, although *A.* is not troubled or molested for the Debt, since it is unreasonable that a Man should always have such a cloud hung over him (e); and in *Lee v. Rook* (f), *Sir J. Jekyll* says, "If I borrow money on Mortgage of my estate for another, I *224] may come into Equity * (as every Surety may against his Principal) to have my Estate disencumbered by him."

A Bill of this nature lies to secure the property of a deceased Debtor from being misapplied by his Executor (g). But such Bill must be filed against the Executor and not against the Debtors, &c. of the deceased, unless where the Executor and Debtors collude (h).

If the Executor is insolvent, on a Bill filed, praying for a Receiver, a Receiver will be appointed, who may bring Actions; and if Persons are about to pay Money to an insolvent Executor, the Court will restrain him from receiving it (i).

Pending a Litigation, the Property is often in danger of being lost or injured, and in such cases a Court of Equity will interpose to preserve it, if the Powers of the Court in which the Litigation is depending are insufficient for that purpose. Thus, during a suit in an Ecclesiastical Court for the Administration of the effects of a deceased Person, a Court of Equity will entertain a Bill for the mere preservation of the Property of the deceased, till the Litigation is determined, although the Ecclesiastical Court, by granting an Administration *pendente lite*, might provide for the collection of the effects (k). But the

(c) *Randall v. Russell*, 3 Meriv. Equity, p. 42, in note. 194, 5.

(d) 1 Ch. Cas. 70. S. C. 1 Eq. Abr. C. 624. pl. 2.

(e) *Ranelagh v. Hayes*, 1 Vern. 190. C. 277. S. C. 1 Eq. Abr. 79.

(f) Mos. 318.

(g) 2 Atk. 212. 1st Vol. of Fonbl.

(h) *Elmslie v. Macanley*, 3 Bro. C.

(i) *Utterson against Mair*, 4 Bro. C.

(k) *Redesd. Tr. Pl.* 122. *King and King*, 6 Ves. 172; and see *Edmunds v. Bird*, 1 Ves. & Bea. 542.

Court will not interfere by appointing a Receiver upon the mere ground that two Wills are in controversy in the Spiritual Court, and *no suggestion that the Property is in danger, and [*225 cannot be secured by an administration *pendente lite* (l).

XII. Bills for the delivery up of Deeds, or for securing them; or for the delivery up of specific Chattels.

BILLS for the delivery up of Deeds, or for the securing of them, are classable under this head. The Court, however, in many cases, will not order Deeds to be delivered up, unless upon Terms (m).

Such Bills appear to have been entertained so early as in the Reign of Edward IV. (n), but not, it seems, where *detinue* would lie (o), a distinction not now regarded.

If the Title to the possession of Deeds and Writings which the Plaintiff prays may be delivered up, depends on the validity of his Title to the Property to which they relate, and he is not in possession of that Property, and the Evidence of his Title to it is in his own power, or does not depend on the production of such Deeds or writings, he must establish his Title to the Property at Law before he can come into a Court of Equity for delivery of the Deeds or writings (p).

If a Man hath Issue a Daughter, and leaves his Wife *prive-mont ensient*, the Wife may detain the Charters against the Daughter, from the possibility that the child the Wife is pregnant with, may be a Son (q).

*Lord Thurlow seems to have been of opinion that as [*226 a general rule, it could not be maintained, that wherever one Party hath an Instrument upon which he cannot maintain an Action at Law, he will be decreed in Equity to give it up (r); nor would he, where a Partnership had been dissolved, and a note afterwards given in the name of the Partnership by the Defendant, order the Plaintiff's name to be erased (s); but this decision was not satisfactory to the Bar at the time; for it is observable, that the note did not on the face of it appear to be void, but only from collateral circumstances (t): and in *Minshaw and Jordan*, cited before Lord Thurlow in the case alluded

(l) *Richards v. Chave*, 12 Ves. 462. *Knight v. Duplessis*, 1 Ves. 324; and on this subject ——— v. ——— argued on demurrer, 13th June 1812, MS.

(m) *Bromley v. Holland*, 5 Ves. 618.

(n) See 9 Edw. 4. 41 B. and the stat. 38 Hen. 8. c. 36. s. 9.

(o) 9 Edw. 4. 41 B.

(p) *Redced. Tr. Pl. 43. Crow v. Ty-*

rell, 3 Madd. Rep. 182.

(q) 41 Edw. 311. *Grounds and Rudiments*, p. 327.

(r) See *Hilton v. Barrow*, 1 Ves. jun. 284, and *Ryan against Macmath*, 3 Bro. C. C. 15; see also *Steadman and others v. Frost*, 3 Madd. Rep. p. 1.

(s) 3 Bro. C. C. 15.

(t) *Vid. arg. in Jackman v. Mitchell*, 13 Ves. 585.

to (u), a note which on the face of it appeared to be good, was ordered to be delivered up. It has been held, that a voluntary Deed will not be ordered to be delivered up (x); nor is there any instance, it seems, of a Decree to deliver up a Bond which on the face of it appears to be void (y), and which by pleading at Law may be shown to be so (z).

Lord Eldon, however (differing, as he confesses, from others) (a), always was of opinion that a Court of Equity has the Jurisdiction, and duty to order a void Deed to be delivered up, and *227] placed with those whose *Property may be effected by it, if it remains in other hands (b). And in a very recent Case his Lordship says, "there is an ancient Jurisdiction in this Court to order Bills, Policies of Insurance, and Annuity Deeds to be delivered up; and it is a wholesome Jurisdiction to other void Instruments to be delivered up, upon which vexatious demands might afterwards be made (c)."

If an Instrument ought not to be used, it is against conscience for a Party to retain it, as he could only do so for some sinister purpose; and in the case of a negotiable Instrument, it may be used for a fraudulent purpose to the injury of a third Person (d).

Where one of three Partners, in Payment of his separate Debt, had drawn a Bill in the Partnership Firm, the Bill was at the Suit of the Partners ordered to be delivered up (e).

Where the *Legislature* declares certain Deeds and Instruments to be void, as the *Annuity Act* (f) does, there is inherent in the Court of Chancery a Jurisdiction to order them to be delivered up (g); but this is always on terms (h); viz. an account of the consideration of the Annuity, with Interest, and Costs *228] *and of all the Annual Payments; the balance on either side to be paid, and the Securities delivered up, and a re-conveyance (i).

(u) 3 Bro. C. C. 19.

(x) *Colman v. Sarrel*, 1 Ves. 50. S. C. 3 Bro. 12. *Oxley v. Lee*, 1 Atk. 624; and see *Doe and Routledge, Cowp.* 705.

(y) *Jackman v. Mitchell*, 13 Ves. 585.

(z) *Franco v. Bolton*, 5 Ves. 368; but see what Lord Eldon observed of that case in *Bromley v. Holland*, 7 Ves. 19.

(a) For instance, in *Mason v. Gardiner*, 4 Bro. 436, the Chancellor said "the Defendant had a right to keep a security (void on account of usury,) whether it is available or not, if he thinks fit."

(b) *The Mayor, &c. of Colchester v. Lawton*, 1 Ves. & Bea. 244. *Hayward v. Dimsdale*, 17 Ves. 112.

(c) *Bromley v. Holland*, Coop. 29.

(d) *Redesd. Tr. Pl.* 104. n. (c) 3d

edit.

(e) *Newman v. Milner*, 2 Ves. jun. 483.

(f) 18 Geo. 3. c. 26. This act is now repealed, and other provisions substituted by the 53 Geo. 3. c. 141.

(g) *Underhill v. Horwood*, 10 Ves. 218. I believe *Byne v. Vivian*, 5 Ves. 604, was the first case. This was followed by *Byne v. Potter*, Ibid. 609. *Bromley v. Holland*, Ibid. 610. reversed on appeal, 7 Ves. 3. S. C. Coop. Rep. p. 9. *Hoffman and Cooke*, 5 Ves. 623. *Duff v. Atkinson*, 8 Ves. 577; and see *Philips and Crawford*, 9 Ves. 214. S. C. 13 Ves. 475; and what is said in *Low v. Barchard*, 8 Ves. 135.

(h) See the decree in *Bromley and Holland*, which seems to have been very carefully drawn up, 7 Ves. 29.

(i) *Holbrook v. Sharpey*, 19 Ves. 131. *Byne v. Vivian*, 5 Ves. 604.

So, where a deed is void on grounds of *public policy*, as where a Bond is given in consideration of *future cohabitation* (k), it will be ordered to be delivered up, though the Plaintiff be *particeps criminis*, as he is also in the case of a Marriage-Brokage Bond (l). And so, where a Bond was given to secure to one Creditor the deficiency of a composition, and was not communicated to the other Creditors (m); and where a bond was given to procure an office contrary to Law (n) they were decreed to be delivered up, though in the latter instance, to a person who was *particeps criminis* (o).

Bills will lie to have promissory Notes, or Policies of Insurance delivered up in cases where a *vexatious use* may be made of them (p); but the Court will not order a *Power of Attorney*, which is *revocable*, to be delivered up (q).

A Bill lies for the delivery up of Deeds unjustly detained; for in an action of Trover damages only can be obtained for the detention of the Deed, but not the deeds themselves (r).

If a Conveyance is made of an Estate with a power *of [*229 Revocation, and it is afterwards revoked, a Bill lies to have the Conveyance delivered up (s).

So, if one settles Land upon his Daughter in Tail, and takes a Bond from her not to commit waste (t), or not to suffer a Recovery (u), the Bond will be ordered to be delivered up.

Where, to a Bill to have Deeds delivered up, the Defendant stated himself to be a Trustee for Mortgagees, *but did not name them*, he was decreed to deliver up the Deeds and pay Costs (x).

Such a Bill will not lie to have a Presentation to a Living upon the next Avoidance, delivered up on account of gross misconduct in obtaining it (y).

In case of the Bankruptcy of a Person possessing Deeds, they will not be ordered to be delivered up on *Petition*, but a Bill must be filed (z).

In some cases, it seems, a *Will* may be applied for to be delivered up, as an Instrument that ought not to vex the Plaintiff's Title; but if it contain in it any thing that has validity it ought not to be delivered up (a).

(k) Gray v. Mathias, 5 Ves. 28.

(l) Lord St. John v. Lady St. John, 11 Ves. 335, 6; and Shirley and Ferrers there mentioned.

(m) Jackman v. Mitchell, 13 Ves. 581; and see Eastabrook v. Scott, 3 Ves. 456.

(n) 5 & 6 Edw. 6.

(o) Law v. Law, For. 140. S. C. MS.

(p) Bromley v. Holland, 7 Ves. 21; and see Jervis and White, 7 Ves. 414. Kemp v. Prior, Ibid. 249.

(q) 7 Ves. 28.

(r) Jackson v. Butler, 2 Atk. 306.

(s) Gilb. Eq. p. 1.

(t) Jervis v. Bruton, 2 Vern. 251.

(u) Tutton v. Molineux, Moore, 809, approved 2 Vern. 251; but see Freeman v. Freeman, 2 Vern. 233. S. C. Prec. Ch. 28.

(x) Earl of Scarborough v. Parker, 1 Ves. jun. 267.

(y) Macnamara v. ——— 5 Ves. 824.

(z) Ex parte Poole, 1 Ves. jun. 160.

(a) Pemberton v. Pemberton, 13 Ves. 298. contra Jones v. Frost, 3 Madd. Rep. 9.

There are many cases where an agreement for the sale of Lands has been ordered to be delivered up (*b*); and in which the Court has resolved, that though it will not specifically perform an agreement, yet, where the conscience of the Party is *230] not affected, it will not *stand neuter, but order the Contract to be delivered up, to prevent proceedings at Law (*c*).

Contracts for the purchase of Estates have been ordered to be delivered up after the death of a Purchaser, and a Suit instituted for an account of Assets (*d*).

Where Persons have had successive interests in Real, or Personal Property, Deeds have, on a Bill for that purpose, been ordered to be deposited in Court (*e*); and there are a great many cases where a Remainder-man in Tail, or a Reversioner in Fee, has been held entitled to have the Title Deeds secured for his benefit, though an estate for Life was standing out (*f*). If the Deeds have got into other hands, and the Tenant for Life is satisfied, and does not interest himself about them, a *Remainder-man*, it seems, may apply to have them delivered up (*g*). But in general the Title Deeds remain with the Tenant for Life (*h*), who is by Law entitled to detain them (*i*); and it has been determined that such relief will not be given against a *Father*, Tenant for Life, in favour of his *Son*, Tenant in Tail (*k*). A Tenant for Life of an Advowson has a right to the possession of *231] the Title Deeds (*l*). The *cases in which Courts of Equity have interfered are where the Remainder-man has been a *stranger* to the Tenant for Life, and not where he is a Tenant for Life under a Settlement made by a Grandfather, with Remainder to the Son in Tail only, Remainder to the Grandfather; but in such case, if there were evidence that the Father was destroying the Deeds in order to better and enlarge his Estate, the Court would take the Custody of the Deeds (*m*).

All Persons concerned in the Title Deeds ought in these cases to be made Parties (*n*).

It seems that a Bill will not lie by a Purchaser from a Contingent Remainder-man for the inspection of Title Deeds in the hands of a Tenant for Life (*o*).

(*b*) See Willan v. Willan, 16 Ves. 83.

(*c*) Mortlock v. Buller, 10 Ves. 308. S. C. MS.; see also 16 Ves. 83. Banbury v. Briscoe, 2 Cha. Cas. 42.

(*d*) Mackreth v. Marlar, 2 P. Wms. 69, in note 1.

(*e*) See a case of that kind, Hodgeson v. Bussey, 2 Atk. 89.

(*f*) Ivie v. Ivie, 1 Atk. 430. Smith v. Cooke, 3 Atk. 382. Reeves v. Reeves, 2 Mod. 132; and see Ford v. Peering, 1 Ves. jun. 78. 2 P. Wms. 477; 8 Ves. 320.

(*g*) 1 Ves. jun. 79.

(*h*) Bowles v. Steward, 1 Sch. &

Lefr. 223; and see Ford v. Peering, 1 Ves. jun. 76, & 8 Ves. 320. 2 Dick. 650.

(*i*) Banbury v. Briscoe, 2 Cha. Cas. 42. Webb v. Lord Lymington, 1 Eden's Rep. 4.

(*k*) Lord Lempster against Lord Pomfret, Ambl. 154.

(*l*) Roberts v. Roberts, 3d Feb. 1818, before V. C. Leach.

(*m*) Pyncent v. Pyncent, 3 Atk. 571.

(*n*) Ibid.

(*o*) Noel v. Ward, 1 Madd. Rep. 322.

A *Jointress* will not be compelled to bring her Jointure Deed into Court, or before a Master, unless the Party requiring it, will confirm her Jointure ; but the Court will direct her to deliver in a Schedule of the Deeds, and will at its discretion order what shall, or shall not, be produced (p). If a Bill be filed against her to have deeds delivered up, without an offer to confirm her Jointure, she may plead the Settlement in bar (q).

A Court of Equity, without any cause in Court, has, from its general jurisdiction over a Solicitor, ordered Deeds in his hands, for the purpose of suffering a Recovery, to be delivered up (r). A Court of Law *has, in a summary manner, at the instance of the Lord, taken Deeds relating to a Manor, and the Court Rolls, out of the hands of a Steward, who is an Attorney of the court (s) ; but such Court will not order an Attorney, to deliver up a Deed which he holds as Party and Trustee ; it having no authority to interfere in the case of a Trust (t).

With respect to the *delivering up of specific Chattels*, it has been holden, that such a Bill will lie, in some cases, for the delivery of a specific chattel to which the Plaintiff is entitled (u) ; *Heir Looms*, for instance (x) ; and where the object of the suit is not capable of a compensation in damages (y) ; as in the case of the *Pusey Horn* (z) ; and of an *old silver Altar Piece* (a) ; a *Silver Tobacco Box* belonging to a club (b) ; a *Cherry-stone* finely engraved ; an extraordinary piece of *wrought plate* (c), and cases of a similar description (d).

In *Trover*, the *value* only of the chattel is recoverable (e) ; in *Detinue*, the Judgment is for the chattel, or the value (f) ; and it is the imperfection of the Law in such Actions, that seems to be the *ground of the Jurisdiction in Chancery, for the [*233 *specific delivery* of the thing itself (g).

XIII. Bills for Apportionment or Contribution.

WITH regard to *Apportionments*, the stat. 11 Geo. 2. c. 19,

(p) *Petre v. Petre*, 3 Atk. 511. *Pyncent v. Pyncent*, 3 Atk. 571 ; and see *Ford v. Peering*, 1 Ves. jun. 76. *Senhouse v. Earl*, 2 Ves. 450.

(q) *Chamberlain v. Knapp*, 1 Atk. 52.

(r) *Ex parte Earl of Uxbridge*, 6 Ves. 425 ; and see *Strong v. Howe*, 1 Str. 621. 8 Mod. 339 ; and see on this subject *ex parte Smith*, 5 Ves. 706.

(s) *Ex parte John Grubb*, 5 Taunt. 206 ; and see *Hughes v. Maire*, 3 T. R. 275.

(t) *Pearson v. Sutton*, 5 Taunt. 384.

(u) See *Nutbrown v. Thornton*, 10 Ves. 163. S. C. MS.

(x) *Earl of Macclesfield v. Davis*, 3

Ves. and Bea. 16.

(y) See *Fells v. Read*, 3 Ves. 71.

(z) *Pusey v. Pusey*, 1 Vern. 273.

(a) See *Duke of Somerset v. Cookson*, 3 P. Wms. 389.

(b) *Fells v. Read*, 3 Ves. 71.

(c) *Pearne v. Lisle*, Ambl. 77.

(d) See *Lloyd v. Loaring*, 6 Ves. 773 ; and *Lowther v. Lowther*, 13 Ves. 95.

(e) 3 Black. Com. 153. See *Scott v. Jones*, 4 Taunt. 865. where it was held that *Trover* lies for an unstamped Agreement, if it can, upon payment of a penalty and stamp-duty, be stamped and rendered available.

(f) Co. Entr. tit. "Detinue." 3 Black. Com. 152. Co. Litt. 286.

(g) Vid. *Wallwyn v. Lee*, 9 Ves. 33.

apportions Rent between the Representatives of a deceased *Tenant for Life*, and the Person succeeding in Remainder; and this statute has been extended by Equity to the case of *Tenant in Tail* (*h*). And *Lord Hardwicke* thought the Act extended to a Tenancy for ninety-nine years, determinable on Lives—to a Tenant in Tail after possibility of Issue extinct; and to an Estate-Tail in a Woman, *ex provisione viri* (*i*).

A Composition for Tithes is not within the Act; and where it was received after the death of the Incumbent, by the Successor, the same was, on a Bill filed for that purpose, apportioned with reference to the respective periods of enjoyment (*k*).

Actions between Partners, to enforce a Contribution, are said to have been frequent of late, but formerly that was always effected by a Bill in Equity; and a Bill, it seems, for that purpose, may still be brought (*l*). (1)

One Surety may compel another in Equity (and this though he *234] be but a supplemental Surety) (*m*), to *contribute towards payment of a debt for which they were jointly bound (*n*); for though the Principal is to discharge all the obligations of all the Sureties (*o*), yet they stand with regard to each other in a relation which gives rise to this right, among others, that if one pays more than his proportion, there shall be a Contribution for a proportion of the excess beyond the proportion which in all events he is to pay (*p*); and this doctrine may be found among the earliest decisions in Equity (*q*); but where any act has been done by the obligee, that may injure the Surety, the Court readily lays hold of it in his favour (*r*), and will in such case, if called upon, decree a perpetual Injunction, to restrain the holder of the security from suing upon it (*s*). If, therefore, the holder of the security, without the consent of the Surety, by positive contract between the Creditor and the Principal, (not where the creditor

(*h*) *Paget v. Lee*, Ambl. 198. S. C. MS.; see *Vernon v. Vernon*, 2 Bro. C. C. 659. *Hawkins v. Kelly*, 8 Ves. 308.

(*i*) *Paget v. Lee*, MS.

(*k*) *Aynsley v. Wordsworth*, 2 Ves. & Bea. 334. The doctrine in *Williams v. Powell*, 10 East 269, was in this case disapproved.

(*l*) *Wright v. Hunter*, 5 Ves. 792.

(*m*) *Cook's case*, 2 Freem. 97.

(*n*) *Toth.* 14. 1 Ch. Rep. 34. 1 Eq. Ca. Abr. 114. case 9; and see *Lloyd v.*

Mackworth, Bunb. 138. *Collins Griffith*, 2 P. Wms. 314.

(*o*) See on this head *Tynt v. Tynt*, 2 P. Wms. 541.

(*p*) *Ex parte Gifford*, 6 Ves. 808.

(*q*) *Lawson v. Wright*, 1 Cox, 276. See *Fleetwood v. Charnock*, before Lord Coventry, Nels. 10.

(*r*) *Law v. East India Company*, 4 Ves. 833.

(*s*) *Nisbit against Smith*, 2 Bro. C. C. 583.

(1) The representative of a deceased partner who has paid the whole of a partnership debt, will not be placed in the condition of the creditor, in order to a contribution from the survivor: But, if the surviving partner alleges, that a balance was due to him from his deceased co-partner, equal to the sum he had been obliged to pay, an account must be taken, before he can claim the aid of chancery to enforce a contribution. *Selle v. Hubbell's Admrs.*, 2 Johns. Ch. Rep. 397.

is merely inactive,) gives time (*t*), accepts a composition, or discharges the Estate of the Principal, the Surety will stand exonerated (*u*); (1) for if a *demand could be made on the [*235 Surety, he might enforce a payment from the Principal contrary to the Agreement (*x*); but the discharge of one Surety does not discharge a Co-surety (*y*).

The Surety is held to be discharged for this reason also, because the Creditor, by so giving time to the Principal, has put it out of the power of the Surety to consider whether he will have recourse to his remedy against the Principal or not; and because he in fact cannot have the same remedy against the Principal as he would have had under the original contract (*z*). A Surety is entitled to every remedy which the creditor has against the principal Debtor; to enforce every security, and all means of payment; to stand in the place of the Creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the Surety; having a right to have the securities transferred to him, though there was no stipulation for it; and to avail himself of all these securities against the Debtor (*a*). (2)

Giving Time to the Principal, the Grantee of an Annuity, has been held to exonerate the Surety from past, as well as future, arrears (*b*).

The doctrine as to *Contribution among Sureties* is not founded on contract, but is the result of general Equity, on the ground of equality of burthen and *benefit. (3) Therefore, if [*236

(*t*) *Samuel v. Howarth*, 3 Meriv. 278. 9 Edw. 4. p. 41. *Skip v. Huey*, 3 Atk. 91. *Richard Burke's case*, mentioned in *ex parte Gifford*, 6 Ves. 809, note a. and in *English v. Darby*, 2 Bos. and Pull. 62. and in 18 Ves. 24. *Rees v. Berrington*, 2 Ves. jun. 540. *Nisbit against Smith*, 2 Bro. C. C. 579. Laches of obligees, in not calling upon the principal so soon as they might have done, if the accounts had been properly examined from time to time, is no estoppel at Law, whatever remedy there may be in Equity. *Trent Navigation Company v. Harley*, 10 East 40.

(*u*) *Ex parte Smith*, 3 Bro. C. C. 1. *Ex parte Gifford*, 6 Ves. 807. *Rees v. Berrington*, 2 Ves. jun. 543, 4. *Wright v. Simpson*, 6 Ves. 784. *Law v. East India Company*, 4 Ves. 824. *Boulton v. Stubbs*, 18 Ves. 20.

(*x*) *English v. Darby*, 2 Bos. & Pull. 62.

(*y*) *Ex parte Gifford*, 6 Ves. 805.

(*z*) *Samuel v. Howarth*, 3 Meriv. 278.

(*a*) *Craythorne v. Steinburne*, 14 Ves. 162.

(*b*) *Eyre v. Bartrop*, 3 Madd. Rep. 221.

(1) Vide *King v. Baldwin*, 2 Johns. Ch. Rep. 554.

(2) Vide *Stevens v. Cooper*, 1 Johns. Ch. Rep. 425. *Cheeseborough v. Millard*, 1 Johns. Ch. Rep. 409. *King v. Baldwin*, 2 Johns. Ch. Rep. 554. *Hayes v. Ward*, 4 Johns. Ch. Rep. 123.

(3) The principle asserted in the text, is applicable in other cases, as well as in the case of a surety: As where land is charged with a burden, each part ought to bear no more than its just proportion of the charge; and equity will subject each party to a just contribution: Thus where six separate lots of land were mortgaged, and the mortgagee, afterwards, released four of them from the lien, leaving the original debt charged on the remaining two; it was held, that the two lots were chargeable with a rateable proportion only of the original debt, and interest, according to the relative value of the six lots, at the date of the mortgage. *Stevens*

three Sureties are bound by *different Instruments*, but for the same Principal, and the same engagement, they must contribute (c).

Where a Bill is filed by a Surety against his Co-surety and the Principal, for a Contribution from the Co-surety in respect of money *actually paid* by the Plaintiff for the Principal, it is not necessary to prove the insolvency of the Principal, but it would be otherwise, if the Principal is not a party to the suit (d).

If A. is bound for B. and has a counter Bond, B. may be compelled in Equity to pay the debt, though A. is not sued; and upon a Covenant to save harmless, a Bill may in like manner be filed by the Covenantor (e).

If Sureties, Co-obligors in Bonds, call upon the Creditor to sue, which he forbears to do, it seems the loss would fall upon the Creditor (f) (1).

If a Surety, a Co-Obligor in a Bond, pays the Bond, he becomes, it seems, a Speciality Creditor of the Principal (g). So, if a Bond be given to a Creditor, in which one joins as a Surety, and the Principal also gives a Mortgage to the Creditor, and the Surety pays the Bond, he is entitled to the benefit of the Mortgage (h).

(c) *Deering v. Earl of Winchelsea*, 1 Cox, 318. S. C. 2 Bos. & Pull. 270.

(d) *Lawson v. Wright*, 1 Cox, 277.

(e) See dict. *Ranlaugh v. Hays*, 1 Vern. 190. Redesd. Tr. Pl. 120; and *Nisbit v. Smith*, 2 Bro. C. C. 582.

(f) *Ex parte Mure*, 2 Cox, p. 74.

(g) *Hotham v. Stone*, at the Rolls,

1810, mentioned, arg o. in *Robinson v. Wilson*, 2 Madd. Rep. 437. The appeal in that case was not prosecuted, the party, by a rise in the price of Stocks, being paid. See also *Gayner v. Royner*, determined by Sir Thomas Sewell, there mentioned.

(h) *Plumbe v. Sanday*, Nov. 1818, MS. before the Vice Chancellor; and see 14 Ves. 162.

v. Cooper, 1 Johns. Ch. Rep. 425. The same principle is recognised in *Chesborough v. Millard*, 1 Johns. Ch. Rep. 409.

And so, where there was an old party-wall between two adjoining proprietors of houses, and one of them being desirous to build a new house on his lot, pulled down the old house, and with it, the party wall, which was ruinous, and rebuilt it with his new house, held that the owner of the adjoining lot was bound to contribute rateably towards the cost of the new party-wall. But he is not bound to contribute towards any extra expense of the new wall; that is, if it be built higher than the old one, or of more costly materials, or of materials of a different nature. *Campbell v. Meier*, 4 Johns. Ch. Rep. 334.

(1) Vide *King v. Baldwin*, on appeal, 17 Johns. Rep. 384. But the mere neglect of the creditor to call on the principal for payment, will not discharge the surety. S. C. 2 Johns. Ch. Rep. 554. And if a creditor does an act injurious to the surety, or omits to do any thing, when required by the surety, the neglect of which would prove injurious, the surety will be discharged, and may set up such matter as a defence in a suit against him, at law. *Ib.* A surety, after the debt has become due, may resort to chancery to compel the creditor to collect his debt of the principal. S. C. 2 Johns. Ch. Rep. 554. and 17 Johns. Rep. 384. And especially, on indemnifying the creditor for the risk, delay and expenses. *Hayes v. Ward*, 4 Johns. Ch. Rep. 123. But quere, whether the creditor can be compelled, in the first instance, to exhaust all his remedies against the principal, before he can resort to the surety? *Ib.* By the civil law, which in this instance, seems to have been adopted by the chancellor of the state of New-York, a surety cannot sue the principal for his indemnity or discharge, before the debt becomes due; but, in some cases, he may do so afterwards, even though he has not himself paid the debt. *Campbell v. Macomb*, 4 Johns. Ch. Rep. 538.

a 12th: 523.

in 116. 14 sept 1836. 37.

*Contribution has been decreed between the *joint and* [*237 *separate* Estates of a Bankrupt; the former having paid beyond its proportion a debt to the Crown, under an Extent, the Bankrupts being jointly and separately bound (i).

Contribution has also been enforced among Assignees in Bankruptcy, to reimburse a Payment by one, under an order, for a Loss, occasioned by their joint Act (k).

Where entire damages are recovered against several Defendants *guilty of a Tort*, a Court of Justice will not interfere to enforce Contribution among the wrong-doers: (1) but the non-performance of a civil obligation is not considered as a Tort (l).

If a Ship be pledged abroad by the Master for Expenses, as it may be, the part-owners are liable and compellable to contribute (m).

So, where goods are thrown overboard for the safety of a Ship, a right to *Contribution* arises; and in Cases of dispute the Contribution may be recovered, either by a suit in Equity, or an Action at Law (n).

On the same principle, if a *Rent-charge* is granted by A. out of all his Lands, and he afterwards sells the Lands by Parcels to divers persons, the Grantee of the Rent may be restrained from levying the whole Rent upon one of the Purchasers (o).

Where A. being seised of Lands in Fee granted a *Rent- [*238 charge issuing thereout, and afterwards devised the Lands to B. for Life, with Remainder to C. in fee, and died, it was held that such a Bill was proper, to compel B. to pay the arrears, for fear all should fall on C. the Reversioner; although it was urged that this was a remote possibility (p).

It is a Rule, that a *Tenant for Life* shall, out of the rents and Profits of the Estate, keep down the *Interest* of Encumbrances upon the same; but that Portions, or the Principal Money due upon any encumbrance, shall be borne by the *whole Estate*. (q).

If, therefore, there be *Tenant for Life* in possession of an

(i) Rogers v. Mackenzie, 4 Ves. 752. Rees v. Berrington, 2 Ves. jun. 542. Price v. Noble, 4 Taunt. 23. Deering v. Earl of Winchelsea, 1 Cox, 320.

(k) Lingard v. Bromley, 18 Ves. 114. (o) Cary 3 S. C. 1 Eq. Cas. Abr. 33.

(l) Ibid. p. 116, 117.

(m) Samsun v. Bragington, 1 Ves. 443. (p) Hayes v. Hayes, 1 Ch. Cas. 223. S. C. 1 vol. Eq. Cas. Abr. p. 78. pl. 4.

(n) Abbott on Shipping, 373. Hallett v. Bousfield, 18 Ves. 187. Shephard v. Wright, Sho. Parl. Cas. 18. (q) Saville v. Saville, 2 Atk. 463. S. C. Select Cas. 32.

(1) Equity will not interpose to compel a contribution between *tort-feasors*, especially, where they do not stand in equal equity. Contribution is allowable only between defendants standing in *æquali jure*; and in this respect, it seems, that the rule at law, and in equity, is the same. Peck v. Ellis, 2 Johns. Ch. Rep. 131.

Estate subject to a mortgage, and he omits to keep down the Interest due on the Mortgage out of the Rents and Profits, the *Reversioner* may file a Bill to make the Rents amenable, and to compel the Tenant for Life to answer for what has accrued due (*r*). A *Tenant by the Curtesy* is considered as Tenant for Life (*s*). And though the Owner of a charge on an Estate lets it run in arrear several years, it is still claimable, even against a Remainder-man, and will not be presumed to be released, or intended to prejudice the Remainder-man (*t*); but unfair conduct, would have the effect of prejudicing the demand of the Encumbrancer against the Remainder-man (*u*).

*239] *If by *Act of Parliament* there be a *Tenancy in Tail unbarrable*, the Tenant in Tail will be compelled to keep down the Interest, because it is a *fraud* not to keep it down (*x*); but otherwise a Tenant in Tail is not obliged to keep down Interest on a Mortgage (*y*), unless he be an Infant (*z*); but if the Tenant in Tail pays the Interest, his Personal Representatives cannot come upon the owner of the Reversion for a satisfaction (*a*).

The Tenant for Life must apply the Rents and Profits during the Estate for Life, in the reduction of any Interest accrued *prior*, as well as *subsequent*, to the commencement of that Estate (*b*). The old rule, calling upon the Tenant for Life to pay a gross sum, is not now in force (*c*). If a Mortgagee permits a Tenant for Life to run in arrear for the Interest, and purchases the Estate for Life, and takes possession under that purchase, he is bound to apply the surplus rents and profits beyond the current Interest, in discharge of the arrear (*d*).

The taker of two funds, one productive and the other unproductive, must keep down the Interest of the charges upon them, and pay off the accrued Interest out of the Rents and Profits of the Life Estate, before he can take any benefit of the Devise, and *240] cannot throw the charge on the Reversion (*e*). *Though the Tenant for Life omits to keep down the Interest, yet as between the Mortgagee and the Estate, the Mortgagee has a right

(*r*) Lord Penrhyn v. Hughes, 5 Ves. 106; and see Jennings v. Looks, 2 P. Wms. 278. Precedents in Chancery, 289.

(*s*) Casborne v. Scarfe, 1 Atk. 606.

(*t*) Aston v. Aston, 1 Ves. 267. Roe v. Pogson, 2 Madd. Rep. 457. 2 Sch. & Lefr. 657.

(*u*) Bentham v. Haincourt, Prec. Chan. 30. 1 Eq. Abr. 320. S. C. mentioned in Loftus v. Swift, 2 Sch. & Lefr. 657, and other cases there alluded to.

(*x*) Countess of Shrewsbury v. Earl of Shrewsbury, 3 Bro. C. C. 196.

(*y*) Chaplin v. Chaplin, 3 P. Wms. 235.

(*z*) See Amesbury v. Browne, 3 Ves. 480. Sarjeson v. Cruise, mentioned 1 Ves. 478.

(*a*) 1 Ves. 481. Rodington v. Rodington, 1 Ball & Bea. 143.

(*b*) Lord Penrhyn v. Hughes, 5 Ves. 106, 7. Tracey against Marquis of Hereford, 2 Bro. C. C. 128.

(*c*) Lord Penrhyn v. Hughes, 5 Ves. 107

(*d*) Ibid. p. 99.

(*e*) Tracey against Viscount Hereford, 2 Bro. C. C. 128.

to be paid out of the Estate, into whatsoever hands it may come (*f*).

A Tenant for Life paying off an Encumbrance will not be presumed to mean to exonerate the Estate (*g*): nor is it necessary for him, in order to keep alive a charge against the Estate, to take any Assignment from the Creditor (*h*). But although the presumption is, that a Tenant for Life by paying off an Encumbrance upon the Estate did not mean thereby to exonerate the Estate, such presumption may be rebutted by Evidence (*i*).

If a Lease for years from a College be limited by Will to persons in succession, the Remainder-man may oblige the first taker to renew, and contribute to the Fine paid on such renewal (*k*).

If there be a Lease for Lives from a Church or a College, and the Life of the Devisee, or Grantee for Life, is one of the Lives upon which the Lease is held, and it is a devise of the Legal Estate, the Tenant for Life will not be compelled to contribute to a renewal, because his Interest is only for Life, and that Life is in the Lease, but the fine and charges of renewal must be paid by the Remainder-man. This is so in the case of a Devise of a legal Estate, and it seems it would be the same in regard to a *cestui que Trust*. But where the lives are all *strangers* to the Tenant for Life, there the Tenant for Life must *contri- [*241 bute, together with those who have a chance in the benefit of the succession provided for by the Will (*l*).

Sometimes the nature of the Estate bequeathed, or the Will of the Testator, compels a renewal (*m*); but where there is no such compulsion, it is in the discretion of the Tenant for Life to renew or not (*n*). But where such a Tenant has renewed, there the Court has said, that the Estate given him being from its nature capable of renewal, the Tenant for Life in renewing for his own use would be taking an unconscientious benefit of the Estate: The Court, therefore, thought of an *Apportionment*, and that so much as the Tenant for Life took for himself he should pay for; so much as he took for the benefit of another, he should be paid for by that other (*o*).

The old doctrine (*p*) of throwing *one third* of the fine for Renewal upon the Tenant for Life, does not now prevail; but the Rule seems to be, that the Tenant for Life contributes only in

(*f*) Lord Penrhyn v. Hughes, 5 Ves. 106.

(*g*) Redington v. Redington, 1 Ball & Beatty, 140. 1 Bro. C. C. 208. 218. 1 Ves. jun. 233.

(*h*) 1 Ball & Bea. 142.

(*i*) Ibid.

(*k*) See Lock and Lock, 2 Vern. 666.

(*l*) Verney v. Verney, 1 Ves. 429, 430. Wilson against Dennison, Ambl. 88.

(*m*) As in Stone against Theed, 2 Bro. C. C. 248.

(*n*) Nightingale v. Lawson, 1 Bro. C. C. 443; and see 2 Bro. C. C. 248.

(*o*) Stone against Theed, 2 Bro. C. C. 248; and see Adderley v. Clavering, 2 Cox 192.

(*p*) Supposed to be established in Verney v. Verney, 1 Ves. 428. Ambl. 88.

proportion to the benefit he takes, which always depends much upon his age (*q*).

If the Tenant for Life of a College lease renews in her own name, it will yet enure to the benefit of the Devisee in Remainder (*r*).

[*242 *XIV. *Bills for Dower, or Partition.*

I. BILLS FOR DOWER.

THERE have been doubts as to the principle on which Equity at first interfered in cases of Dower ; but so early as in the Reign of Elizabeth, proceedings in Equity for the Recovery of Dower appear to have been permitted (*s*).

Dower is a mere *legal demand*, (1) and it seems to be the difficulty under which a Widow labours at Law, from not being able to ascertain the Lands out of which she is Dowable (*t*), or the Persons against whom to bring her Writ, (*u*), and from the embarrassments occasioned by outstanding Terms, that entitles her to equitable relief. (2) The Law gives her Dower out of the Estates of her Husband, and the mesne profits from his death ; and if she proceeds at Law, and there should appear to be any Mortgage, or Terms of Years in her way, she would lose her costs. The Heir has all the Title Deeds in his hands, and knows what the Estates are ; his conscience therefore is affected, and hence, it seems, Equity interposes (*x*), and so usefully, that Writs of Dower are now seldom brought (*y*).

How far Courts of Equity will assist a Widow in the assignment of Dower has been much questioned ; *but the re-

(*q*) *Nightingale v. Lawson*, 1 Bro. C. C. 440. There is an error in the printing of the Judgment in this case, which is corrected in 1 Cox, 181. *White v. White*, 4 Ves. 24, on Rehearing, 5 Ves. 554 ; and on Appeal, 9 Ves. 554.

(*r*) Sic dict. *Brookman v. Hales*, 2 Ves. & Bea. 50.

(*s*) *Wild v. Wells*, 1 Dick. 3.

(*t*) *Dormer v. Fortescue*, 3 Atk. 130.

(*u*) *Manaton v. Squire*, 2 Freem. 26. S. C. 2 Ch. Cas. 237. but not as to this point.

(*x*) See on this subject Lord Redesd. Tr. Pl. 110, 111. *Curtis v. Curtis*, 2 Bro. C. C. 631, &c.

(*y*) *Mundy v. Mundy*, 2 Ves. jun. 128.

(1) On a bill of foreclosure, where the widow of the mortgagor was made a party, she was held entitled to the use of one third of the surplus proceeds of a sale of the mortgaged premises, remaining in court, after payment of the mortgage debt, as her equitable dower ; which one third part was ordered to be put at interest for her benefit. *Tabele v. Tabele*, 1 Johns. Ch. Rep. 45. Vide *Titus v. Neilson*, 5 Johns. Ch. Rep. 452.

So, a release by the husband of an equity of redemption, not executed by the wife, though she executed the mortgage, is no bar to her claim for dower in the equity of redemption, or remaining interest of the husband, after payment of the mortgage. But she is bound to contribute rateably towards the redemption of the mortgage. *Swaine v. Perine*, 5 Johns. Ch. Rep. 482. Vide *Evertson v. Tappen*, 5 Johns. Ch. Rep. 497.

(2) Vide *Swaine v. Perine*, 5 Johns. Ch. Rep. 482.

sult of the decisions seems to be, that where there is no ground of Equity to prevent their interference, such as a purchase for a valuable consideration, the Courts will proceed to set out Dower; though if the Title to Dower be disputed it must first be established at Law (z); and if the Wife be divorced *a mensa et thoro*, a Court of Equity will not assist her in recovering Dower, but leave her to law (a).

In Equity, as at Law, there is no limitation to a claim of the arrears of Dower (b) (1), and though at Law, by the death of the Heir, the Widow loses all arrears incurred in his Lifetime (c), yet in Equity, if she has filed her Bill before the death of the Heir, she is entitled to the mesne profits (d) from the time her Title accrued (e) (2), provided she has made an Entry (f); and so, in case of her death, are her Representatives (g).

As no Costs are given at Law upon a Writ of Dower, so none have commonly been given in Equity, upon a Bill for Dower (h).

In concluding this subject, it may be observed, that if a Mother be Guardian to her child, and receives the Rents of the Estate of which she was dowable, and a Bill is filed against her for an Account, she will be allowed a third of the profits in respect of her *Dower, though the same has not been assigned to [*244 her (i) (3).

II. BILL FOR A PARTITION.

PROCEEDINGS in Chancery to obtain a Partition of Estates, are of constant occurrence.

The Jurisdiction in these cases appears to have arisen in consequence of the Act of the 32 Hen. VIII. which makes one Tenant in Common accountable to the other, so that since the Statute they are become, as it were, Trustees the one to the other (l).

(z) Redesd. Tr. Pl. 98, 3d edit. and see the cases there cited; and also D'Arcy v. Blake, 2 Sch. & Lefr. 391.

(a) Shute v. Shute, Prec. Chan. 111.

(b) Oliver v. Richardson, 9 Ves. 222.

(c) Mordaunt v. Thorold, 3 Lev. 375.

(d) Curtis v. Curtis, 2 Bro. C. C.

620.

(e) Dormer v. Fortescue, 3 Atk. 130.

(f) Tilley v. Bridge, 2 Vern. 519. S. C. Prec. in Ch. 252.

(g) Wakefield v. Child, mentioned 1 Fonb. Eq. p. 158, in note.

(h) Redesd. Tr. Pl. 98, 3d edit.

(i) Hamilton v. Mohun, 1 F. Wms.

121.

(k) See tit. "Fraud."

(l) Sic. dict. arg. 1 Vern. 421.

(1) Vide Jones v. Powell, 6 Johns. Ch. Rep. 194.

(2) So, a widow is entitled to the value of the mesne profits arising from the use of the undivided third part of real estate of which her husband died seised, from the time of his death, exclusive of the improvements made on the premises. *Hazen v. Thurber*, 4 Johns. Ch. Rep. 604. Vide *Swaine v. Perine*, 5 Johns. Ch. Rep. 482.

(3) What provision by the husband for the wife, shall bar her of the right of dower, and what not. *Adsit v. Adsit*, 2 Johns. Ch. Rep. 448. *Smith v. Kniskern*, 4 Johns. Ch. Rep. 9. *Swaine v. Perine*, 5 Johns. Ch. Rep. 482. *Jones v. Powell*, 6 Johns. Ch. Rep. 194.

The earliest instance, however, of a Bill for *Partition* is thought to be (m) in the time of *Elizabeth* (n).

In the 14 Car. 2, (o) a *Partition* was decreed, notwithstanding *Femes Covert* and *Infants*, as well as *Encumbrancers*, were concerned. In the Reign of *James 2*, they were become frequent (p); and in that of his Successor, the Chancellor observed, "he did no more question the Jurisdiction of the Chancellor in these cases than he did whether a gift to a Man and his Heire were a Fee-simple (q)."

Proceedings to obtain a *Partition* of Estates may be referred to this head, since a Court of Equity issues a Commission of *Partition*, on account of the extreme difficulty attending the process of *Partition* at Law, where the Plaintiff must prove his Title as he declares, and also the Titles of the Defendants, and Judgment is given for *Partition* according to the respective Titles so proved. That is attended with so much difficulty, that by analogy to the Jurisdiction of a Court of Equity, in the case of *Dower*, a *Partition* may be obtained by Bill (r). And a commission so obtained is much more convenient than the Writ; the valuation of the proportions is better considered, and the Interests of all parties much more attended to (s) (1).

A *Partition* at Law operates by the Judgment of a Court of Law, and delivering up of Possession in Pursuance of it, which concludes all the Parties to it. *Partition* in Equity proceeds upon Conveyances to be executed by the Parties; and if the Parties be not competent to execute the Conveyances, the *Partition* cannot be effectuated (t).

If the Defendants be *Infant Cestuis que Trust*, the Conveyance is respited until they attain twenty-one (u).

It has been said, that a Decree for a *Partition* is a matter of right, and that there is no instance of not succeeding in it, but where no proof is adduced of a Title in the Plaintiff (x) (2). On

(m) Harg. Co. Litt. 169.

(n) See Tothill's Transactions of Chancery, tit. "Partition."

(o) Martyn v. Perryman, Chan. Rep. 235.

(p) 1 Vern. 421. 2 Ch. Ca. 189.

(q) Manaton v. Squire, 2 Freem. 26.

(r) Agar v. Fairfax, 17 Ves. 552.

(s) Calmady v. Calmady, 2 Ves. jun. 570. Redesd. Tr. Pl. 110.

(t) Whaley v. Dawson, 2 Sch. & Lefr. p. 372.

(u) Attorney-General v. Hamilton, 1 Madd. Rep. 214.

(x) Parker against Gerard, Ambl. 236. 1 Ves. & Bea. 554.

(1) If doubts arise on a bill for partition, as to the extent of the rights and interests of the parties, it is the usual course to direct a reference to a master, as the estate and interest of the parties must be ascertained before a commission can issue. *Phelps v. Green*, 3 Johns. Ch. Rep. 302.

(2) Chancery will not sustain a bill for partition, in a case where the title is denied, or is not clearly established; but the bill may be retained to give the plaintiff an opportunity to establish his title, at law. *Wilkin v. Wilkin*, 1 Johns. Ch. Rep. 111. Vide *Phelps v. Green*, 3 Johns. Ch. Rep. 302. *Cox v. Smith*, 4 Johns. Ch. Rep. 271. But where the question arises upon an equitable title set up by the

the other hand, it has been observed, that as a Plaintiff has a legal Title, it is *discretionary* in the Court whether they will grant a Partition or not; and where there are suspicious circumstances in the Plaintiff's Title the Court *will leave the [*246 Party to law (y). The Plaintiff must, it appears, state upon the Record his own Title to a Moiety (z), and the Titles of the Defendants; and the better to enable the Plaintiff to obtain a Judgment for Partition, the Court will direct inquiries to ascertain who are, together with him, entitled to the whole subject (a).

On a Partition, *every part* of the Estate need not be divided. If there be three houses, it would not be right to divide every house, for that would be to spoil them; but some recompense is to be made, either by a sum of Money, or Rent for owelty of Partition, to those that have the houses of least value (b). If, however, there be but *one* house, there may be a Decree for the Partition of the same, though highly inconvenient (c); and where exceptions were taken to the Report of Commissioners for the Partition of a House among Joint-tenants, one party complaining that she could not get to her division, except up stairs, which stairs were allotted to another Person, the Chancellor would not interfere (d); and where the Bill was for a Partition of a *Cold Bath*, it was decreed (e). So it is, if there be but one *Mill* or an *Advowson*, (f) *to be divided; but it is different where [*247 there are other Lands which may make up the share (g). A Partition was decreed between Tenants in common of a *Waste*, though great inconvenience might ensue, as the want of Pasture, shade, &c. (h).

It is no objection to a *Partition*, that other persons may come *in esse* and be entitled: otherwise, in every case where there is

(y) Cartwright v. Pulteney, 2 Atk. 380; and see Scott and Fawcett, 1 Dick. 299, and Baring v. Nash, 1 Ves. & Bea. 556, 7.

(z) Cartwright v. Pulteney, 2 Atk. 380.

(a) Agar v. Fairfax, 17 Ves. 552. Calmady v. Calmady, 2 Ves. jun. 570.

(b) Earl of Clarendon v. Hornby, 1 P. Wms. 446.

(c) Turner v. Morgan, 11 Ves. 143; and see 1 P. Wms. 447.

(d) Anon. MS.

(e) Warner against Baynes, Ambl. 589. S. C. alluded to in Parker against Gerard, Ambl. 236.

(f) As to Partitions of an Advowson, see Bodicoate v. Steers, 1 Dick. 69. Matthews v. Bishop of Bath and Wells, 2 Dick. 652.

(g) Turner v. Morgan, 11 Ves. 143; and see 1 P. Wms. 447.

(h) Manaton v. Squire, 2 Ch. Cas. 237.

defendants, a court of chancery will decide on the title. *Coxe v. Smith, ut supra*. And so, where the plaintiff's right to one undivided moiety of the premises, was admitted by the defendants, who claimed the other moiety, but disagreed as to their respective rights and interests, partition was ordered to be made between the plaintiff and defendants, aggregately; dividing the premises into two equal parts, so as to give the plaintiff one moiety in severalty, leaving the other moiety to be partitioned among the defendants, on a future application to chancery, when their conflicting claims should have been established at law. *Phelps v. Green*, 3 Johns. Ch. Rep. 302.

a settled Estate, with Remainders to persons who may come in esse, there never could be a Partition (i).

An *Infant* Tenant in Common, or Joint-tenant, may file a Bill for a Partition, or such a Bill may be filed against him (k), and it will be decreed; but the Conveyance will be respited till the Infant is of age (l). If a Contingent Remainder, not capable of being barred or destroyed, is limited to a Person not in being, the Conveyance must be delayed until such Person shall come in being, or until the Contingency shall be determined; in either case a Supplementary Bill would be necessary to carry the Decree into execution. An executory Devise may occasion a similar embarrassment (m).

A Bill for a Partition may be sustained on behalf of a Joint-tenant of a *Lease for years*, nor in such case is the Reversioner a necessary Party (n).⁽¹⁾ And a Bill for a Partition of *Tithes* will *248] lie (o); but the *Court has no Jurisdiction to grant a Commission of Partition between Tenants in Common of a *Copyhold* (p), the Statutes relative to Partition not applying to Copyholds (q). It is the same as to *Joint-tenants* of a Copyhold, and also to *Parceners* (r); and on the same ground, an agreement to divide Copyhold Lands will not operate as a Partition, nor can be enforced, it being without the Lord's privity (s).

By the Statute, 41 Geo. 3 c. 109, s. 16, it is enacted, that it shall be lawful for the Commissioners in Enclosure Acts, upon the request in writing of any Joint-tenants, Co-parceners, or Tenants in Common, or any or either of them, or of the Husbands, Guardians, Trustees, Committees, or Attorneys of such as are under Coverture, Minors, Lunatics, or under any other incapacity, or absent beyond Sea, to make Partition and Division of the Estates and Allotments to such of the said owners or proprietors who shall be entitled to the same as Joint-tenants, Co-parceners, or Tenants in Common; and to allot the same accordingly in Severalty.

(i) *Wills v. Slade*, 6 Ves. 498.

(k) *Tuckfield against Buller*, Ambl. 197. S. C. 1 Dick. 240.

(l) *Lord Brook v. Lord Hertford*, 2 P. Wms. 518. Ambl. 197. S. C. 1 Dick. 240. Redesd. Tr. Pl. 97, 3d edit.

(m) Redesd. Tr. Pl. 97, 3d edit.

(n) *Baring v. Nash*, 1 Ves. & Bea. 551.

(o) *Baxter v. Knollys*, 1 Ves. 495.

(p) *Scott v. Fawcett*, 1 Dick. 299. This case appears to be correct on search into the Register's Book, except that the Defendant's name is Faussett. Hall

v. Freeth, 10th March 1819, MS. In this case the parties agreed to a Decree for a Sale, the Plaintiff finding the Master of the Rolls against him, as to so much of the Bill as prayed a Partition of certain Copyhold Premises.

(q) See Gilb. Ten. 185. Co. Coph. s. 54. Cro. Car. 44. *Burrell v. Dodd*, 3 Bos. & Pull. 378. *Oakley v. Smith*, 1 Eden 261.

(r) See Hale's MS. note, mentioned Co. Litt. 59 a. n. 1.

(s) *Oakley v. Smith*, 1 Eden 261.

(1) The heirs of a mortgagor, may have partition of an equity of redemption among themselves, as well as tenants in common, for life, or for years: But mortgagees and judgment creditors cannot be joined in a bill for partition; nor can their rights be affected by a partition. *Wotten v. Copeland*, 7 Johns. Ch. Rep. 140.

A Bill for a Partition of Lands in *Ireland* cannot be sustained here, as the Court cannot award a Commission there; just as at Common Law no *Writ of Partition lies in England for [*249 Lands in Ireland (t).

Under a Commission of Partition to four Commissioners, and two different returns made, one, by two of the Commissioners, and another, by the remaining two, the Court cannot act; but will grant another Commission directed to five Commissioners(u). In cases of this kind the proper mode is to move to quash the return (x).

With respect to Costs in cases of Partition, it is said to have been determined, that where the Plaintiff was entitled to three or four hundred Acres, and the Defendant to four or five only; and though the Defendant would have rather given up his part than be at the expense of a Partition, yet it was decreed, and to be at the equal expense of both parties (y)! This unreasonable doctrine seems not now adhered to: the Rule now appearing to be, that in these cases no costs are given until the Commission; and that the Costs of issuing, executing, and confirming the Commission, are borne by the Parties, in proportion to the value of their respective Interests, (1) and no Costs allowed of the subsequent proceedings (z).

*Commissioners under a commission of Partition, have [*250 no lien on the Commission for their charges (a).

XV. *Bills to establish a Modus.*

A BILL to establish a *Modus* is in the nature of a Cross-Bill against a demand for Tithes; for a Person is not allowed to file a Bill to establish a *Modus* unless he has been actually disturbed by Proceedings at Law, in Equity, or in the Ecclesiastical Court (b). And the Bill must set out the Modus sought to be established, with certainty, or the Bill will be dismissed (c).

It seems settled, that occupiers only, who are not owners, can have a decree for establishing payments in lieu of Tithes (d), but there is only one case of that description (e).

(t) Cartwright v. Pettus, 2 Chan. Cas. 214.

(u) Watson v. Duke of Northumberland, 11 Ves. 153. S. C. MS. and see Corbett v. Davenant, 2 Bro. C. C. 252.

(x) Ibid.

(y) Parker against Gerard, Ambl. 237, and so determined by Lord Thurlow, in Hyde v. Hindley, 2 Cox, 408.

(z) Agar v. Fairfax, 17 Ves. 558. Calmady v. Calmady, 2 Ves. jun. 568; and see Metcalf v. Beckwith, 2 P. Wms. 377, 8. Baring v. Nash, 1 Ves. & Bea. 584. See vid. Redd. Tr. Pl. 98. In Hyde v. Hindley, 2 Cox, 408, it was held,

that where the parties are entitled unequally, if the Plaintiff be entitled to the smaller share, the costs shall be borne equally!

(a) Young v. Sutton, 2 Ves. & Bea. 365.

(b) Gordon v. Simpkinson, 11 Ves. 510. S. C. MS. Lord Coventry v. Barslem, Anstr. 567, n. 4 Gwill. Tith. 1596.

(c) Ekins v. Dormer, 3 Atk. 534.

(d) Vid. Warden, &c. of St. Paul's v. Morris, 8 Ves. 163.

(e) Wardens, &c. of St. Paul's v. Crickett, 2 Ves. jun. 563.

(1) Vide Phelps v. Green, 3 Johns. Ch. Rep. 305.

XVI. *Bills to marshal Securities.*

It has been held, that if a Party has two Funds by which his Debt is secured, a Person having an Interest in one Fund only, has a right in Equity to compel the former to resort to the other fund, if that is necessary for the satisfaction of both. (1) If therefore *A.* has two Mortgages, and *B.* has one, *B.* has a right to throw *A.* upon the security which *B.* cannot touch (*f*).

*251] *So, where in Bankruptcy the Crown by Extent lays hold of all the Property, even against Creditors, it has been confined to such property as would leave the Securities of Encumbrancers effectual (*g*).

In a case, where the Loyalist Estates in *America* were, under the forfeiting Acts, to be sold for the payment of debts, this was held not to be a ground for an Injunction to restrain an Action here on a Bond (*h*).

But though, if two Funds of a Debtor are liable to one Creditor, and only one Fund to another, the former shall be thrown upon that Fund, to which the other cannot resort, in order that he may avail himself of his own Security, where that can be done without injustice to the Debtor or the Creditor; yet that principle has never been pressed to the effect of injustice to the common Debtor. Much less have persons who are not common Creditors of the same Debtor, a right to compel the Creditors of both Funds to resort to the one, in order to leave a large dividend for those who can claim against the other (*i*).

(*f*) *Lanoy v. Duke and Duchess of Atholl*, 3 Atk. 446; see *Aldrich v. Cooper and others*, 8 Ves. 388. 395. This last case contains a luminous exposition of the subject, in all its bearings.

(*g*) *Aldrich v. Cooper and others*, 8 Ves. 388. 395.

(*h*) *Kempe against Antill*, 2 Bro. C. C. 11.

(*i*) *Ex parte Kendall*, 17 Ves. 527.

(1) Vide *Evertson v. Booth*, on appeal, 19 Johns. Rep. 486. *Dorr v. Shaw*, 4 Johns. Ch. Rep. 17. *Hawley v. Mancius*, 7 Johns. Ch. Rep. 184. But if the sufficiency of the fund to which the junior creditor cannot resort, is doubtful, or the prior creditor refuses to rely on that fund for the satisfaction of his debt, equity will not compel him to relinquish any part of his security, unless his debt is paid. *Evertson v. Booth*, *ut supra*. But if the first creditor has a judgment against *A.* and *B.*, and the second creditor a judgment against *B.* only, the second cannot compel the first to take the land of *A.* only; it not being apparent whether *A.* or *B.* ought to pay the debt due to the first; and there being no equitable right shown in *B.*, to have the whole debt charged on *A.* *Dorr v. Shaw*, *ut supra*. A judgment creditor, who holds, also, personal property as collateral security, will not, at the instance of a subsequent judgment creditor, be confined to his security, or restrained from prosecuting his remedy under the judgment, until he has pursued and exhausted the personal security; especially, when he offers to substitute the subsequent creditor in his place, on being paid the amount of his debt. *Brinckerhoff v. Marvin*, 5 Johns. Ch. Rep. 320. A judgment creditor cannot, in equity, enforce payment of his debt against the land of a subsequent purchaser, so long as there is sufficient property of the debtor, remaining unsold, to satisfy the judgment: In such case, however, the creditor can resort to the land purchased of the debtor, for so much of his debt only, as may remain unpaid, after the estate of the debtor has been exhausted. *Clowes v. Dickenson*, 5 Johns. Ch. Rep. 235.

Where the Property of an American Loyalist had been confiscated during the American War, subject to the claims of such of his Creditors as were friendly to American Independence to be made within a limited time, and restrained to the Inhabitants of a particular State, a Bill, it was holden, would not lie to have Bonds delivered up, or to compel the Creditor to resort in the first instance to the Fund arising from *the confiscation, [*252 as it did not appear that the Creditor had the clear means of making his demand effectual against that Fund (k); and if that had so appeared, the Creditor it seems would have had a right to sue personally (l). (1)

Where a Testator devised two several Estates for the payment of his debts, and devised also an Annuity payable out of one of them; and the Trustees sold that estate out of which the Annuity was payable; the Court decreed the other Estate to stand charged with the Annuity (m).

(k) Wright v. Simpson, 6 Ves. 714.

(l) Ibid. contra, Wright v. Nutt, 3 Bro. C. C. 326. 1 H. Black, 136.

(m) 1 Ch. Rep. 295. and see Fran-

cis' Max. Eq. p. 10, where other cases are mentioned, illustrative of the doctrine of marshalling Securities.

(1) In equity, the rule of distribution of insolvent estates, is equality; and the creditors are to be paid *pari passu*, in rateable proportion. *Riggs v. Murray*, 2 Johns. Ch. Rep. 576. *Honorary or privileged debts* are not entitled to preference: The law recognises no such distinction. Ibid. So, if a fund for the payment of debts, be created by a decree of chancery, and creditors come in to avail themselves of it, they will be placed on the footing of equality. *Codwise v. Gelson*, on appeal, 10 Johns. Rep. 507. But where the law gives a priority of payment, equity will not destroy it;—thus the lien of a judgment will be protected, although the creditor is obliged to apply to chancery for assistance. Ibid. And a creditor, who was also a trustee under a fraudulent assignment, will be ordered to account for the trust property, with interest on the amount, deducting his commissions and costs; and must come in *pari passu*, with the other creditors, for his rateable proportion of the debtor's estate. *Riggs v. Murray*, *ut supra*.

But where no bankrupt law exists, the principle of such a law, as to the distribution of the bankrupt's estate, being equality among creditors, an insolvent debtor may prefer one creditor to another; but such preference is to be viewed with jealousy, and should be so construed as to guard against abuse and fraud. Ib. And a debtor may prefer one creditor to another, when no legal lien intervenes, provided it be done fairly and from honest motives. *Williams v. Brown*, 4 Johns. Ch. Rep. 682. Thus, if an insolvent debtor confess a judgment in favour of a particular creditor, for a *bona fide* debt, the judgment creditor will retain his priority. *Williams v. Brown*, *ut supra*. Vide *M'Menomy v. Murray*, 3 Johns. Ch. Rep. 435. *M'Menomy v. Roosevelt*, 3 Johns. Ch. Rep. 446. *Murray v. Riggs*, on appeal, 15 Johns. Rep. 571. But if the debtor use the judgment, so confessed, for his own purposes, as to effect a sale or change of his property, which is sold at a great sacrifice, and is purchased in by himself, chancery will interpose, and either allow the other creditors to redeem it at the price it sold for, or direct a re-sale for their benefit. *Williams v. Brown*, *ut supra*.

Although it is the favourite policy of a court of chancery to distribute the assets of a debtor equally among all his creditors, *pari passu*, yet when a judicial preference has been established, by the superior diligence of any creditor, such preference will be preserved. *M'Dermott v. Strong*, 4 Johns. Ch. Rep. 687. Where a testator devised all his estate, real and personal, in trust, for the payment of debts, and the residue to be distributed, chancery will, on the principle of equal distribution of assets, enjoin a suit at law brought for the purpose of gaining a priority. *Benson v. Le Roy*, 4 Johns. Ch. Rep. 651.

XVII. *Bills to secure Property in Litigation in other Courts.*

WHERE a suit was pending in the Ecclesiastical Court to recall a Probate, on the ground that the Testator was insane, Lord Loughborough appointed a Receiver before Answer, and without notice of the Motion (n). (1) In such case, as Probate had been granted, no Administrator *pendente lite* could be appointed by the Ecclesiastical Court (o). But where there is a dispute respecting Probate, and no Probate has been granted, this Court, it has been held, will not interfere, because the Ecclesiastical Court has Jurisdiction to grant Administration *pendente lite*, and the Administrator may maintain an Action to recover Debts, by *253] which means no loss can *fall upon the personal Estate (p); but in a recent case (q) it was determined that a Bill will lie for an Account of personal Estate and a Receiver pending Litigation for Probate, though an Administration *pendente lite* might be obtained in the Ecclesiastical Court; but if no ground be stated in the Bill, to show that in case of Intestacy, Letters of Administration could not be immediately obtained, it cannot be sustained (r). (2)

A Bill of this description lies, similar to the Writ of *Estrepement*, formerly in use, to prevent the Commission of Waste by a Tenant whilst the Title to Land is in Litigation (s); (3) but against

(n) *Palmer v. Price*, mentioned arg. e. in Anonymous case, 12 Ves. p. 4.

(o) *Powis v. Andrews* mentioned 1 Ves. 324.

(p) *Knight v. Du Plessis*, 1 Ves. 324.

(q) *Atkinson v. Henshaw*, 2 Ves. & Bea. 85.

(r) *Jones v. Frost*, 3 Madd. Rep. 1.

(s) *Redeas. Tr. Pl.* 110, 3d edit.

(1) An injunction will not be awarded, in the first instance, against an executor or trustee, charged with abusing his trust; but a receiver may be appointed. *Boyd v. Murray*, 3 Johns. Ch. Rep. 48.

(2) Where certain persons claimed an exclusive privilege, by statute, of navigating the waters of a state, by boats or vessels moved by the power of steam, chancery will not grant an injunction to restrain the defendant from removing his boat, pending an action at law, brought to recover the boat as forfeited under the statute, unless there be a direct charge of danger that the boat will be removed pending the suit at law. *Livingston v. Gibbons*, 4 Johns. Ch. Rep. 571.

A creditor at large, or before judgment, is not entitled to an order for an injunction, to restrain the debtor from disposing of his property in fraud of such creditor. *Wiggins v. Armstrong*, 2 Johns. Ch. Rep. 144. Nor, is the suspicion of one partner that the other will misapply the partnership funds, or abuse his trust, a sufficient ground for an injunction to restrain him from interfering with the partnership effects. *Woodward v. Schatzell*, 3 Johns. Ch. Rep. 412.

(3) Where the plaintiff intends to bring an ejectment, and has taken the preparatory step of giving notice to quit, which has nearly expired, an injunction to stay waste will be granted, although no suit is actually pending, and although no action can be maintained against the tenant, at law. *Kane v. Vanderburgh*, 1 Johns. Ch. Rep. 11. But an injunction will not be granted where the right is doubtful, or where the defendant is in possession claiming adversely, and an ejectment is pending, and undetermined, to recover the possession. *Storm v. Mann*, 4 Johns. Ch. Rep. 21.

Chancery will not, unless under very special circumstances, grant an injunction, where waste has been committed by the tenant, to prevent him from removing the timber cut; in ordinary cases, the court will interfere only to stay future waste. *Watson v. Hunter*, 5 Johns. Ch. Rep. 169.

a mere Trespasser the Court will not interfere, though the Writ of Estrepement applied in such case (t). (1)

XVIII. Bills to compel the Lord of a Manor to hold a Court, or to admit a Copyholder; and Bills to reverse an erroneous Judgment in a Copyhold Court.

WHERE the Lord of a Manor refused to hold Courts and grant Admittances, &c. the Copyhold Tenants exhibited their Bill, and Lord Coventry decreed, that the Defendant and his Heirs should from time to time, as occasion should require, procure Courts to be held for the said Manors, and suffer the Plaintiffs and their Heirs to make Surrenders to such Persons and for such Uses as the Copyholders should *limit and direct, and that the [*254 Surrenderes should be admitted accordingly (u).

From the earliest times, it has been held, a Bill lies to compel a Lord to admit a Copyholder (x); the reason given, being, that an Action would not lie against the Lord, and there is no remedy but in Chancery (y). In a recent case, however (z), the Court of King's Bench granted a *mandamus* to compel the Lord to admit the Heir of a Trustee to enable him to try his Title; but this assumed Jurisdiction of the Courts of Law does not, it is presumed, oust the Jurisdiction of a Court of Equity.

If a Copyholder sues by Petition in the Lord's Court, upon which the Lord gives Judgment, though no appeal or writ of Error will lie in respect of such Judgment, yet the Court of Chancery will correct the proceedings in case any thing is done therein against conscience (a).

HAVING considered the instances in which a Court of Equity interferes to prevent Fraud, we now proceed to the consideration of those cases where Equity interferes to redress Frauds which have been committed.

(t) 8 Ves. 90; & 9 Ves. 291.

(u) *Moor v. Huntington*, Nels. 12.

(x) See Cro. Jac. 368. 2 Bulstr. 336.

S. C. and see other cases of the kind noticed in Grounds and Rudiments, p. 84.

(y) *King v. Coggan*, 6 East, 431.

(z) See Co. Copyh. sect. 38.

(a) Per Ch. J. Parker, in *Christian v.*

Corren, 1 P. Wms. 330.

(1) Chancery will not grant an injunction to restrain a mere trespass, where the injury is susceptible of a perfect pecuniary compensation, in the ordinary course of Law. *Jerome v. Ross*, 7 Johns. Ch. Rep. 315. Vide *Stevens v. Beckman*, 1 Johns. Ch. Rep. 318. But it seems, that in very strong and peculiar cases of trespass, where the injury is irreparable and destructive of the plaintiff's estate, an injunction may be allowed. *Jerome v. Ross* and *Stevens v. Beckman*, ut supra. So, injunctions may be granted to prevent trespasses, as well as to stay waste, not only on the ground that the injury is irreparable, but also to prevent a multiplicity of suits: As, where there was a claim by the defendant to *estovers* in the plaintiff's land, under which right he had cut timber; and there had been one decision at law in the plaintiff's favour, and another suit was pending on the same question. *Livingston v. Livingston*, 6 Johns. Ch. Rep. 497.

***255]** *Judges have never ventured to predicate as a general proposition, what constitutes Fraud (c); nor can any invariable Rule be established. Fraud is infinite; and were a Court of Equity to lay down Rules how far they would go in extending relief against it, or to define strictly the species of Evidence of it, the Jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of Man's invention would contrive (d).

Crescit in orbe Dolus; cases cannot always be found to serve as direct Authority for subsequent cases; but if a case arises of Fraud, or presumption of Fraud, to which even no principle already established can be applied, a new principle must be established to meet the Fraud, as the principles on which former cases have been decided have been from time to time established as Fraud contrived new devices; for the possibility will always exist, that human ingenuity is contriving Fraud will go beyond any cases which have before occurred (e).

All Frauds are cognizable in one or other of the Courts of Justice. Some are of such turpitude, that the Criminal Courts only have Jurisdiction over them; for Courts of Equity do not affect to consider Fraud in the light of a crime: it is not their province to punish (f); nor have they a censorial Authority (g): they ***256]** interfere in cases of Fraud in a civil, and not a **criminal* point of view. The Court of Star Chamber, as before observed, not only gave the same Relief as Courts of Equity now do, in cases of Fraud, but also *punished* the fraudulent Defendant; and it was the ancient course of the Court of Chancery, in cases of notorious Frauds, to decree a Defendant to pay *exemplary Costs*; but that practice, owing to the difficulty of carrying it into execution, has long since been superseded (h).

Fraud has been defined to be, *any kind of Artifice by which another is deceived* (i); all surprise, trick, cunning, dissembling, and other unfair way that is used to cheat any one, is considered as Fraud (k). *Collusion*, in a Court of Equity, is considered as Fraud (l). And it is worthy of remembrance, that in all cases of Fraud, the remedy does not die with the Person, but the same relief may be obtained against the Representative of the Person committing the Fraud (m); nor can the Statute of Limitations be

(c) See *Mortlock v. Buller*, 10 Ves. 306, 7. *Atk.* 43.

(d) See Lord Hardwicke's Letter to Lord Kaimes, 1 vol. *Life of Lord Kaimes*. 237; and see what is said to the same effect, in *Lawley v. Hooper*, 3 *Atk.* 278, and in *Gifford v. Vaux*, Dom. Proc. 27 Feb. 1739.

(e) *Webb v. Rorke*, 2 Sch. & Lefr. 566.

(f) See *Waltham v. Broughton*, 2

(g) See 1 Ves. & Bea. 298.

(h) *Waltham v. Broughton*, 2 *Atk.* 43.

(i) See Pothier *Traite des Obligations*. Partie 1. Chap. 1. s. 1. Art. 3. s. 3.

(k) *Nels.* 439.

(l) *Garth v. Cotton*, 3 *Atk.* 757.

(m) *Ibid.* and the decree to that effect. *ibid.* p. 758.

pleaded to a Bill for the discovery merely of a Fraud (n); length of time forming no Bar (o). "*No length of time,*" as Lord Erskine more than once emphatically observed, "*can prevent the unkenning of Fraud*" (p). "The next question," says *Lord Northington in one case (q) "is in effect whether [*257 delay will purge a Fraud? Never, while I sit here. Every delay arising from it adds to its injustice, and multiplies the oppression." It seems, however, where the Fraud was committed a considerable time back, the Bill ought to state that, it *was discovered within six years* before the Bill was filed (r); (1) or a waiver of the objection, as to length of time, should appear on the face of the proceeding (s); length of time always forming a strong objection, where it can be used to show *acquiescence*, but in no other way. (2) Though persons are embarrassed, and reduced by the Fraud of others, yet the Court cannot act upon such circumstances, for then there would be an end of all limitations of actions in the cases of distressed Persons; for if relief might be given after twenty years on the ground of such distress, it might after thirty, forty, or fifty years (t). Even in a case of *gross fraud*, the Court will not decree an Account after a considerable length of time against Executors, Legatees, and innocent Persons, claiming under the fraudulent party (u). Fraud is a fact, and there is as much danger of evidence being lost in such case as in any other. In the case of a *Steward* keeping his Accounts in a fraudulent manner, it has been said, *"*there can be* [*258 *no period, however remote, through which the Court will not look, for the purpose of setting such an Account right*" (y).

A Bill will not lie by a Patron against an Incumbent to resign, where no *quare impedit* has been brought, nor the Bill filed till seven months after Institution and Induction, though by misinformation and fraud the Plaintiff's consent was obtained; for

(n) Bicknell v. Gough, 8 Atk. 558.

(o) Pickering and Lord Stamford, 2 Ves. jun. 280. Gifford v. Vaux, Dom. Proc. 27 Feb. 1739.

(p) See on this subject Cottrell v. Purchase, Forrester 66, and S. C. in MS. Bacon's Tracts, p. 37. 1 Ves. jun. 160. 328. and see Pickering v. Stamford, 2 Ves. 280. Booth v. Lord Warrington, 1 Bro. C. C. 455.

(q) Alden v. Gregory, 2 Eden, 285.

(r) South Sea Company v. Wymondell, 3 P. Wms. 144; see also Dougl.

630, and what is said in Gifford and Hort, 1st vol. Sch. & Lefr. Rep. 406. Hovendon v. Lord Annesley, 2 Sch. & Lefr. 634, 5. and in Medlicott v. O'Donnell, 1 Ball. and Beatty, 166.

(s) Picket v. Loggan, 14 Ves. 244.

(t) Hovendon v. Lord Annesley, 2 Sch. & Lefr. 639, 40.

(u) Hercy v. Dinwoody, 2 Ves. jun. 92. Doleraime v. Browne, 3 Bro. C. C. 633; Bonney v. Ridgard, 1 Cox, 149.

(y) Earl of Hardwicke v. Vernon, 14 Ves. 511.

(1) Vide Croft v. Arthur, 3 Des. 223.

(2) The lapse of time merely, will not bar a claim to set aside a sale, on the ground of fraud; unless it be so great as to furnish very strong presumptions against it; and such presumptions will have more weight, if some of the witnesses to the transaction, or the fraudulent party, are dead. Butler v. Haskell, 4 Des. 707.

the Statute (*Westminster, 2. ch. 5.*) makes *plenarily* a bar against all mankind (z).

In all cases of *Fraud* not penal, a Court of Equity has a concurrent Jurisdiction with Courts of Law (a), with the exception as to *Fraud in obtaining a Will*, which, where it relates to Real Estate, belongs to the consideration of a Court of Law (b); and if to Personal Estate, is exclusively decided upon in the Spiritual Court (c), where Parties may be examined by way of allegation touching the Fraud (d). It has often been lamented, that a Court of Equity cannot take cognizance of Fraud as to Wills of Personal Estate (e).

Although there may have been instances of Issues directed by Courts of Equity on the bill of an Heir at Law, to set aside a Will for Fraud, where no opposition has been made to that mode of proceeding, he cannot insist on such direction. He may *259] bring *his Ejectment: and if there be any impediments to the proper trial of the merits, he may come into Equity to have them removed; but he has no right to have an Issue substituted in the place of an Ejectment (f); but where a Will is sought to be set aside for Fraud, and there are outstanding terms, admitted by the answer, an Issue will be directed to try the validity of the Will; nor is it necessary that there should be evidence as to the Fraud in obtaining the Will (g).

Every question concerning the *execution* and *validity* of a Will under which any *legal* or *equitable* Estate in Land is claimed, is properly and only triable at Law; nor do Courts of Equity establish a Will by which a *Trust* only is devised, without a Trial, if desired. The Court will not in any case, set aside a Will, without directing an Issue (h).

If, therefore, a Bill be filed to set aside a Will for Fraud, and for a Receiver, the Defendant may plead that the Will was duly executed, and that it ought to prevail, till upon an Issue at Law it should be found to be otherwise: but the Plea cannot be extended to the Receiver, for the Court will not suffer its hands to be tied up, if in the progress of the Cause it should be necessary to appoint a Receiver (i).

Though a Will of personal Estate proved in the Spiritual Court, cannot, though obtained by Fraud be controverted in Equity, *260] yet if a Party claiming *under such a Will comes for any aid in Equity it will not be granted him (k).

(z) *Gardiner v. Cooke*, Mos. 18, 19.

(a) *Colt v. Woolaston*, 2 P. Wms. 136. *Bright v. Eynon*, 1 Burr. 395. 4 Inst. 84.

(b) *Powis v. Andrews*, 2 Bro. P. C. 476. *Bates v. Graves*, 2 Ves. jun. 208.

(c) *Kerrick v. Barnaby*, 1 Str. S. C. 7 Bro. P. C. 449. Toml. Edit.; and see *Archer v. Mosse*, 2 Vern. 8.

(d) *Stephenson v. Gardener*, 2 P.

Wms. 286.

(e) *Ex parte Fearon*, 5 Ves. 647.

(f) *Jones v. Jones*, 3 Meriv. 171.

(g) *Shewin v. Lewis*, mentioned in note, *Jones v. Jones*, 3 Meriv. 167.

(h) *Bates v. Graves*, 2 Ves. jun. p. 288.

(i) *Anon.* 3 Atk. 17.

(k) *Nelson v. Oldfield*, 2 Vern. 76.

A Will and Probate, even in the common form, in the proper Ecclesiastical Court, which is in the nature of a Sentence is a good Plea to a Bill by Persons claiming as next of Kin to a Person supposed to have died intestate (*l*). And if Fraud in obtaining the Will is charged, that is not a sufficient equitable ground to impeach the Probate; for the Parties may resort to the Ecclesiastical Court, which is competent to determine upon the question of Fraud (*m*). But where the Fraud practised has not extended to the whole of the Will, but only to some particular clause; or if Fraud has been practised to obtain the consent of the next of Kin to the Probate, Courts of Equity have declared the Executor a Trustee for the next of Kin (*n*).

There are cases also, where, when a will of Real and Personal Estate has been obtained by forgery and Fraud, and is sought to be set aside in Equity, and an Issue *devisavit vel non* has been directed, and on a Trial at Bar the Will has been found to be forged, the Executors under Will, notwithstanding the same had been proved in the Ecclesiastical Court, have been held to be Trustees for the next of Kin, as to the Personal Estate (*o*).

And in some cases, it seems, a Will, though good *at [*261 Law, may be set aside in Equity for *Fraud*; as, if *A.* should agree to give *B.* Bank Bills to the amount of 1,000*l.* in consideration that *B.* should devise his Lands to *A.*, and accordingly *B.* does make such a Will, and *A.* gives *B.* the Bank Bills, but those Bank Bills prove to be forged, this, though a good Will at Law, may nevertheless be avoided in Equity by the Testator's heir for the fraud (*p*).

Although a Man may have a mind of sufficient soundness and discretion to regulate his affairs in general, yet if such a domination or influence be obtained over him as to prevent his exercising such discretion, in the making of his Will, he is not considered as having such a *disposing mind* as will give effect to the Will (*q*).

Previous to the consideration of cases of Fraud, it is proper to advert to some rules laid down upon the subject.

1. The Rule of *Law* as to Fraud, is considered as a good Rule in *Equity*, (*viz.*) that Fraud is never to be presumed; but that may be a Fraud in Equity which is not so at Law (*r*).

(*l*) 1 Vern. 397.

(*m*) 2 Vern. 8. 76. 2 Chan. Cas. 178. 1 P. Wms. 286.

(*n*) 1 Str. 666. Gilb. 213. 1 Ves. 284. cited Bedesd. Tr. Pl. 209. 3d edit.

(*o*) Barnaley v. Powell, 18 July 1749. S. C. 1 Ves. 219. 284. & Str. Marriot v. Marriot; but see Gilb. Almsworthy v. Shapland, 31st March 1772.

(*p*) Goss v. Tracy, 1 P. Wms. 288. S. C. 2 Vern. 700.

(*q*) Mountain v. Bennet, 1 Cox, 353.

(*r*) Trenchard v. Wanley, 2 P. Wms. 166; and see Townshend v. Lowfield, 3 Atk. 536. Nels. 185. Sed vid. Earl of Chesterfield v. Janson, 1 Atk. 351, 2, where it is said there may be presumptive fraud.

2. If the *Principal* in a Fraud be *released*, Parties who would have been *secondarily* liable cannot be proceeded against (*s*).

3. An impeached Deed cannot be supported by evidence of considerations wholly different from those alleged in it (*t*).

*262] *4. A Deed cannot be set aside *in part* for Fraud. If set aside at all it must be *in toto* (*u*) ; and if obtained by Fraud, it will be set aside *in toto*, though innocent Persons are interested under it (*x*). (1)

Solemn Conveyances. Releases and Agreements, will not be set aside on slight grounds (*y*) ; *prima facie* they are conclusive ; but whenever *suppressio veri* or *suggestio falsi* occur, and more especially both together, they afford a sufficient ground for setting them aside (*z*). (2)

If an Instrument is obtained from Persons ignorant of their Rights, but whose Rights are known to the Party obtaining the Instrument, a Court of Equity will relieve (*a*). (3) Courts have even gone farther, and have set aside Instruments obtained

(*s*) Thompson against Harrison, 2 Bro. C. C. 464.

(*t*) Watt v. Grove, 2 Sch. & Lefr. 501.

(*u*) See Myddleton v. Lord Kenyon, 2 Ves. jun. 408. Lawley v. Hooper, 3 Atk. 281.

(*x*) Davidson v. Russell, 2 Dick. 761. Worsley v. De Mattos, 1 Bur. 474. Huguenin and Baseley, 14 Ves. 273.

(*y*) 1 P. Wms. 727. 1 Atk. 10. 1 Ves. 19. 2 Atk. 692.

(*z*) See Jervis v. Duke, 1 Vern. 19. Broderick v. Broderick, 1 P. Wms. 239. Cann v. Cann, 2 P. Wms. 727. Bowles v. Stewart, 1 Sch. & Lefr. 209.

(*a*) Broderick and Broderick, 1 P. Wms. 239, and the cases referred to in the note.

(1) Vide *Murray v. Riggs*, 15 Johns. Rep. 571., on appeal. A distinction prevails between those contracts which are void on account of fraud, and such as are only voidable, in respect of their being confirmed by any subsequent act of the party : Thus, a deed fraudulent in part, is void, and cannot be confirmed ; but a deed *constructively* fraudulent, being contrary to the policy or provisions of a statute, or being voluntary, is voidable only, and may become valid by matter *ex post facto*. *Murray v. Riggs*, *ut supra*. *Verplanck v. Sterry*, on appeal, 12 Johns. Rep. 536. Vide *Sterry v. Arden*, 1 Johns. Ch. Rep. 261. And in most cases, the party will not be entitled to relief, unless the fraud be consummated at the time of the execution of the contract. A fraud in a subsequent and distinct transaction, will not vitiate a prior contract. *Chesterman v. Gardner*, 5 Johns. Ch. Rep. 29.

(2) And thus, where *A*. procured a conveyance of land from *B*. by fraud, in which *C*. was concerned, *A*. afterwards confessed a judgment to *C*., who assigned it to *D*. for a valuable consideration, and without notice of the fraud, it was held, that the deed to *A*. being void, the judgment created no valid *lien* on the land, and that *D*. took the assignment subject to all the rights of the debtor ; and it was decreed, that the land should be reconveyed, and discharged from the judgment, and that a perpetual injunction should be awarded. *Livingston v. Hubbs*, 2 Johns. Ch. Rep. 512.

(3) And thus, where an attorney revived, by *scire facias*, a judgment of 13 or 14 years standing, on which, only a small sum, if any thing, was due, knowing that the land on which the judgment was a *lien*, was in possession of innocent and *bona fide* purchasers ; and afterwards used the judgment to compel the purchasers, who were ignorant of the facts, to pay and secure to him a debt against the person under whom they claimed ; the court, on the ground of imposition and undue advantage, ordered the attorney to refund the money he had so obtained, and set aside the security by him taken, with costs. *Reigel v. Wood*, 1 Johns. Ch. Rep. 402.

from Parties ignorant of their Rights, although no Fraud or Imposition has been practised (b).

An Agreement for a Lease, founded on a fraudulent statement, will be rescinded, and an account directed between the Parties (c).

If, indeed, a Man upon a Treaty for any Contract, makes a *false representation*, whether knowingly or not (d), by means of which he puts the Party bargaining *under a mistake [*263 upon the Terms of Bargain, it is a Fraud, and relievable in Equity (e).

If A. be about to marry C. on a false representation by D. to C. that A. is worth 20,000*l.*, and for this representation A. gives D. 5,000*l.*, A. may recover it back, not because the Court has any regard to A. in such a transaction, but in respect to C. the Lady thus injured (f); but though, if a representation is improperly made on an intended marriage, it must be made good, yet if in the misrepresentation the Party refers to the Deeds, or otherwise, out of which the misrepresentation arose, and the other Party is capable of seeing whether the misrepresentation was right, there the Party cannot have redress for such misrepresentation (g).

A Purchaser, it seems, will not be relieved against the Title of A., who, ignorant of his own Title, encouraged the Purchaser to buy (h).

Suppressio veri is often considered as fraudulent, and forming a ground for relief in Equity. If a Person under the influence of mistake, builds on another Person's ground, that person seeing the Building and not interfering to put the party on his guard, such suppression of the truth is considered as *fraudulent*, and a Court of Equity will relieve (i). *A Landlord, [*264 therefore, has been restrained from cutting ornamental trees in a Lawn during the Term, his conduct amounting to a consent to the Tenant's plan of Improvement, laying out the Lawn, &c. (k). But there does not appear to be any Case in which a Lessee, either of a Term, or from year to year, making any improvement upon the Estate in his possession, though with the

(b) Evans against Lewellyn, 2 Bro. C. C. 150.

(c) Long v. Fletcher, 2 Eq. Abr. 5.

(d) Anslie v. Medlycot, 9 Ves. 21. S. C. MS.; and see Graves v. White, Freem. 57. Scott v. Scott, mentioned arg. 3 Ves. 458, and fully reported 1 Cox, 365.

(e) Neville against Wilkinson, 1 Bro. C. C. 546. Evans v. Bicknell, 6 Ves. 174. 183. Burroughs and Lock, 10 Ves. 475. De Manneville v. Crompton, 1 Ves. and Bea. 355, 6.

(f) Tooke v. Harwood, MS. and see on this subject 2 Sch. & Lefr. 362.

(g) Anslie v. Medlycot, MS. 1806.

(h) Hobs v. Norton, 2 Ch. Cas. 128. It is not very clear what the Chancellor's opinion was. See also Dyer v. Dyer, *ibid.* p. 109.

(i) Pilling and Armitage, 12 Ves. 85; see also 2 Atk. 82. East India Company v. Vincent; and see Dann v. Spurrier, 7 Ves. 231. Lord Mansfield said if a man lets another build on his Land, it shall be pronounced a *Gift*. *Sed qur.* Vid. Matts v. Hawkins, 5 Taunt. 23; and see Forway v. Rowe, 19 Ves. 156. 159.

(k) Jackson v. Cator, 5 Ves. 688.

complete knowledge of the Landlord, has been held entitled as against that Landlord, to have his Lease prolonged until he shall obtain reimbursement for the improvements he has made (*l*) ; and it has been held he cannot prove under the Lessor's commission in respect of such improvements (*m*). But if a Landlord, knowing the Tenant's Lease to be bad, stands by, and allows him to make improvements on the faith of the supposed goodness of his Lease, in such case, it seems, Equity would relieve (*n*).

So, too, where *A.* being Tenant in Tail, Remainder to his brother *B.* in Tail, and *A.* not knowing of the Entail, made a settlement on his wife for life, for her jointure, without levying a fine, or suffering a recovery, which *B.*, who knew of the Entail, engrosses, but does not mention any thing of the Entail, because, as he confessed in his answer, if he had spoken any thing of it, his brother, by a recovery, might have cut off the Remainder and barred him ; although after the death of *A.*, *B.* recovered in Ejectment against the Widow by force of the Entail ; yet she was relieved in Chancery, and a perpetual Injunction granted for this Fraud in *B.* in concealing the Entail ; since, had it been disclosed, the settlement might have been made good by a recovery (*o*).

Although (except in some few cases already noticed) a power defectively executed does not admit of relief, yet if the Remainder-man, with notice of the defect, has lain by a considerable time, and suffered the Appointee to expend Money on the Estate, and acquiesced in his Title, a Court of Equity will compel him to make good the defect (*p*).

So, where one made his Will, and his Wife Executrix, and his Son afterwards prevailed on his Mother to get the Father to make a new Will, and to name him Executor, he promising to be a Trustee only for his Mother ; this was considered a Fraud, and the Son held to be accountable as a Trustee (*q*).

There are a variety of cases where a person standing by, and by silence contributing to a Fraud, has been compelled to remedy the mischief his fraudulent silence has occasioned (*r*).

The servants of a Grazier driving a flock of Sheep to London were encouraged by an Innkeeper to put the Sheep into *266] pasture grounds belonging to the Inn ; *the Landlord

(*l*) 12 Ves. 85 ; but see 7 Ves. 231.

(*m*) Anon. 1804, MS.

(*n*) Pilling and Armitage, 12 Ves. 85. Kenney v. Browne, 3 Ridgw. P. C. 518.

(*o*) 3 Bacon's Abr. 299.

(*p*) Sugden on Powers, 303, 1st edit. and the cases there cited.

(*q*) Thyne v. Thyne, 1 Vern. 296 ; and see also other cases determined on the same principle ; as Mead and Webb, 4 Bro. P. C. 497, a case between Lessor and Lessee as to a suppression of the

amount of Land demised. Ramsden and Hylton, 2 Ves. 304. where Release held bad on account of the suppression of a Settlement. Beatriff and Smith, Eq. Ca. Abr. 357, which was a Sale of Land and suppression of articles.

(*r*) See Hunsden v. Cheney, 2 Vern. 150, the concealment of an Entail ; see also Draper and Borlan, 2 Vern. 370, concealment of an Encumbrance. Ibbotson and Rhodes, 2 Vern. 554. concealment of a Mortgage.

seeing the Sheep, consents they shall stay there one night, and then distrains them for Rent ; but the Court relieved him against the distress, with Costs, at Law and in Equity (s).

If a Conveyance by *Lease and Release*, or *Bargain and Sale*, has been obtained by means, which in a Court of Equity have the character of Imposition, Fraud, or undue Advantage, which, indeed, may all be comprehended under the general term Fraud, a *Fine*, constituting part of that Conveyance which is so affected, whatever may be the effect at Law, is no bar to relief in Equity. The Person deriving Title under it is a Trustee ; and the species of relief is by directing a Re-conveyance (t). If a Contingent Remainder is destroyed by a legal Conveyance, and that conveyance is obtained by Fraud, Equity will relieve against it (u). And so, where a *Fine*, followed by *Non-claim*, was levied by one who got possession under a *forged Deed*, a Court of Equity decreed against the *Fine* (x). In a very early case, where a *Fine* and *Recovery* were obtained by circumvention, it was held that the Party taking the benefit of them was compellable to recompense the Person circumvented (y). (1)

**Letters Patent*, if obtained by Fraud, may be set aside [*267 at the suit of the Attorney-General (z).

Fraudulent Instruments may be proved to be such by facts apparent on the face of the Instrument, as well as by extrinsic Evidence. The *consideration* of a Deed may be such, as of itself, to show the Deed was fraudulently obtained. Allusion has already been made to the case of young *Heirs*, and *Reversioners*, and in what manner *inadequacy of consideration* affects Contracts by them (a). In regard to Persons not standing in those situations, mere inadequacy of price, unless it amount to what is termed, *gross inadequacy*, is not a ground for annulling an Agreement, though *executory*, if the same appears to have been fairly entered into, and understood by the Parties, and capable of being specifically performed ; still less does such inadequacy form

(s) *Fowkes v. Joyee*, Prec. Ch. 7 S. 443. 446.
C. 2 Vern. 129.

(t) *Pickett v. Loggan*, 14 Ves. 234 ; see also *Wilkinson v. Brayfield*, 2 Vern. 307. *Baker v. Pritchard*, 2 Atk 390. *Barnsley v. Powell*, 1 Ves. 289. In *Penne v. Peacock*, For. 42, it was doubted how far fraud could affect so solemn an act as a *Fine* ; but in the same case in MS. no such doubt appears.

(u) *Englefield v. Englefield*, 1 Vern.

(x) *Cartwright v. Pulteney*, 2 Atk. 381 ; and see *Addison and Committee v. Dawson*, 2 Vern. 678, and *Clarke by Committee v. Richards*, 2 Vern. 412.

(y) *Welby v. Welby*, Tot 164 ; and see *Wright v. Booth*, Ibid. 167. *Coleby v. Smith*, 1 Vern 205.

(z) *Attorney-General v. Vernon*, 1 Vern. 277. 370. S. C. 2 Ch. Rep. 353.

(a) Ante, p. 119.

(1) So, where *H.* purchased lands of *J. S.*, and took a deed, and executed a mortgage back to secure a part of the purchase money ;—the mortgage was recorded, but *H.* neglected to record his deed pursuant to statute ;—the defendants, who had purchased the claim of an occupant, without title, procured, by fraud, a release from *J. S.*, and had it recorded prior to the recording of the deed to *H.*, the defendants were decreed to execute a release of their pretended claim to *H.* *Lepton v. Cornell*, 4 Johns. Ch. Rep. 262.

a ground for rescinding an Agreement *executed*; but under such circumstances the Court would not decree a specific performance of an Executory Agreement (b). Lord Chief Baron Eyre observed, that "there was no case where mere inadequacy of Price, independent of other circumstances, had been held sufficient to set aside a transaction (c)."

A bargain may be hard and unconscionable, and yet valid, "unless," as Lord Eldon says "the inadequacy of price is such as shocks the conscience," and amounts in itself to conclusive and *268] decisive evidence of *fraud* in the *transaction (d). The inequality must be so gross that a man would start at the bare mention of it (e); but "inadequacy," says Chief Baron Macdonald, "is not to be measured by a little on one side, or the other, by this or that excess, if so, where shall we cast anchor (f)?"

Whenever, therefore, an Agreement is so extremely inadequate as to satisfy the conscience of the Court, by the amount of the inadequacy that there must have been imposition, or that species of pressure upon distress, which in the view of a Court of Equity amounts to oppression, the Court will give relief (g); as where fifty guineas were given for an estate worth 700*l.* (h). An Annuity cannot, generally speaking, be set aside for inadequacy of Price (i); but if the price be grossly inadequate, it may, it seems, be set aside (k). What shall be termed *gross inadequacy* has not been defined, unless the saying "what shocks the conscience," be a definition. If Premises worth 22*l.* are let for 16*l.* 8*s.*, the difference is not so gross as to vitiate the *269] bargain on the *ground of inadequacy of consideration (l). Where a Sale was for *one half* of the worth, that, it has been held, would be relieved against (m); (1) such, certainly, was the

(b) See Day v. Newman, 2 Cox, 77; and see post.

(c) See Griffith v. Spratby, 2 Bro. 180, in n. S. C. 1 Cox, 383, by the name of Griffith v. Spratley; and so Moth v. Atwood, 5 Ves. 845, and what is said by Lord Erskine in Lowther v. Lowther, 13 Ves. 103.

(d) Coles v. Trecothick, 9 Ves. 246; and see Clarkson v. Hanway, 2 P. Wms. 203. Gibson v. Jeyes, 6 Ves. 273. Crowe v. Ballard, 1 Ves. jun. 219. S. C. 2 Cox, 253. How v. Wilden, 2 Ves. 516. Low and Barchard, 8 Ves. 137; and what is said in Burroughs v. Lock, 10 Ves. 474. Murray v. Palmer, 2 Sch. & Lefr. 488. and Western v. Russell, 3 Ves. & Bea. 192, 3.

(e) Per Lord Eldon, in Astley v. Weldon, 2 Bos. and Pull. 351.

(f) Evans v. Browne, 1 Wight. 109.

(g) Underhill and Horwood, 10 Ves. 219. Peacock v. Evans, 16 Ves. 517; and see what is said in Darley v. Singleton, 1 Wight. 29.

(h) Boothby v. Vernon, 9 Mod. 147.

(i) Floyer against Sherrard, Amb. 18. Speed and Phillips, 3 Anst. 752.

(k) Heathcote and Paignon, 2 Bro. C. C. 167. Lawley v. Hooper, 3 Atk. 278; but see the observations on those cases in Mac Gee v. Morgan, 2 Sch. & Lefr. 395, in note. Lamplugh v. Cox, 1 Dick. 411. Underhill v. Horwood, 10 Ves. 219.

(l) Lukey v. O'Donnell, 2 Scho. & Lefr. 471.

(m) Maskeen v. Cole, T. T. 8 Geo. 2. 1733. MS.

(1) Where the attorney of the Plaintiff, at his request, purchased, at a sheriff's sale, the farm of the defendant, which was worth 2000 dollars, for ten dollars, the

doctrine of the Civil Law ; and in an early Case the Chancellor wished it were so in England (n). but the decision alluded to does not appear to have been followed (o).

The doctrine of the Scotch Law as to *facile Men* (p) does not apply, in its full extent, in England ; but wherever a person, taking advantage of the necessities of another, practises *extortion*, a Court of Equity will decree the Party to refund, and without inquiring into the particular circumstances of the imposition (q). Lord Eldon, however, has on this subject put a very strong case : " Suppose," says he, " that A B. had said, ' Make out your Title as Heirs ; I will give no information or assistance ; but if without doing so you will take 1000*l.*, I will give that sum : ' considering the passages that are to be met with in the Judgments of this Court, though a valuable Property had been acquired, to which that sum was very inadequate, I will not say whether such a case would have been reached by the Doctrine of this Court, protecting, upon public principles, persons in distress" (r).

When a Bond is obtained from one in distress, and *not [*270 then bound to pay, the party prevailed upon to give it, is taken from the evidence of the transaction itself, not to have been

(n) 2 Chan. Cas. 121.

(o) See what is said in *Mortlock v. Buller*, 10 Ves. 292.

(p) As to this doctrine it may gratify curiosity to see what is said in Boswell's Tour in the Hebrides, p. 428, and what

Dr. Johnson observes upon it.

(q) *Thornhill v. Evans*, 2 Atk. 330.

(r) *Pickett v. Loggan*, 14 Ves. 240.

and see on this subject *Ardglass v. Muschamp*, 1 Vern. 238, 239. *Proof v. Hines*, Forrester 111.

gross inadequacy of price, connected with the circumstances that the sale was made on a stormy day, and that no one was present, except the officer and the attorney, was held sufficient to justify the inference of fraud ; and the debtor, on a bill filed by him for that purpose, was allowed to redeem the estate, on paying the sum due on the execution, and the amount paid by the attorney, on the sale, with interest, &c. *Howell v. Baker*, 4 Johns. Ch. Rep. 118. So, where the heirs apparent of an idiot, whose estate was large, and in the hands of a committee, being, themselves, weak, illiterate and necessitous, and finding it difficult to procure and perpetuate the evidence of their relationship, employed an agent to transact the business for them, at a commission of ten per cent. on the amount to be recovered ; and the agent afterwards purchased their interest in the estate, at about one fourth of its ultimate value ; and after the estate was recovered, he took from them, in pursuance of the original agreement, a conveyance of their interest, and a power of attorney to prosecute the decree, and to receive to his own use, their shares of the estate yet to be accounted for : The contract was set aside on the ground of gross inadequacy of price, connected with the weakness and necessities of the sellers. *Butler v. Haskell*, 4 Des. 651 : But, in general, mere inadequacy of price, though the bargain be a hard one, will not be sufficient to induce the court to set aside an agreement. *Gregor v. Duncan*, 2 Des. 639. Vide *Butler v. Haskell*, *ut supra*, 687. Yet, the inadequacy of price may be so gross, as to furnish a strong, and even conclusive presumption, though there be no direct proof of fraud, that an undue advantage has been taken of the ignorance, weakness, or necessity of the vendor. *Butler v. Haskell*, *ut supra*. 697. Nor will the hazard run by the purchaser of an estate of losing what he may advance on some contingency, or specious offers to rescind the bargain, when the injured party could not refund the money, preclude the court from granting relief in such cases. *Butler v. Haskell*, *ut supra*, 698, 699.

properly advised on the subject, and it will be set aside (s). A Conveyance of a Reversionary Interest from an uncle to a nephew, under circumstances of gross inadequacy of price and alleged fraud, was attempted to be set aside after forty years, but held to be supported by the consideration of natural love and affection inserted in the witnessing part of the Deed, although not expressed in the recital (t).

If a Bargain, which was fair at the time, becomes, by subsequent events, very advantageous, the Vendor cannot make any claim in a Court of Equity on the ground of inadequacy of Price (u). If, for instance, a Man should contract to sell an Estate in consideration of an Annuity during his Life, and the Contract is signed, and the Party to have the Annuity dies before the first half year, the Court would still execute the Contract (x).

So, if a Deed be entered into by Parties fully apprized of their rights, in order to put an end to a Suit although upon inadequate consideration it cannot be set aside (y).

*271] Nor does the Court ever relieve against Marriage *Contracts for Settlement, Jointures, or other Provisions, though they may be very unequal, and in favour of the Wife, "because it cannot set the Wife in *statu quo*, or unmarry the Parties," as was said in *Wycherley v. Wycherley*, where the Remainder-man, on a Bill to be relieved against a Jointure made by Tenant for Life, upon his death-bed in consideration of and previous to his Marriage, by virtue of a power reserved to him, was denied relief (z).

In all cases, it must be remembered, that if a Contract, voidable for inadequacy of consideration, is confirmed by the Party, with his eyes open, (as the expression is,) it will not be relieved against (a).

Voluntary Conveyances are frequently declared by Courts of Equity to be *fraudulent*, and the Court will determine the fact of Fraud without a trial at Law, (b). (1)

(s) *Brasley v. Magrath*, 2 Sch. & Lefr. 35. *Carpenter v. Herriot*, Cor. Lord Northington, cited arg. o. 2 Ves. jun. 493, by the name of *Carpenter v. Elliot*, and reported 1 Eden, 338.

(t) *Whalley v. Whalley*, 1 Meriv. 436.

(u) See *Batty and Lloyd*, 1 Vern. 141, and *Gowland and De Faria*, 17 Ves. 25.

(x) See 3 Bro. C. C. 605. and Lord Eldon adopts this case in *Coles and Trecothick*, 9 Ves. 246. *Mortimer* and

Capper, 1 Bro. 156.

(y) *Stephens against Lord Viscount Bateman*, 1 Bro. C. C. 22; and see *Leonard v. Leonard*, 2 Ball & Beatty, 179.

(z) Cited in *North v. Ansell*, 2 P. Wms. 619. 2 Eq. Abr. 391. *Anon. Ch. Cas.* 17. *Whitfield v. Taylor*, Show. P. C. 20.

(a) *Maskeen v. Cote*, Trin. Term, 8 Geo. 2. 1733, MS.

(b) *White v. Hussey*, Prec. Ch. 15.

(1) A court of equity will set aside the deeds of a person conveying his whole property to a woman with whom he cohabited, no valuable consideration being proved to have been paid, as fraudulent against creditors. *Buist v. Smyth*, 2 Dec. 214.

Whatever previous determinations there may formerly have been to the contrary (c), it is now fully settled, upon the Statute 27 Eliz. c. 4, which was passed to prevent Frauds on *Purchasers*, that a *voluntary Settlement*, however free from actual fraud, is, by the operation of that Statute, deemed fraudulent and void against a *subsequent Purchaser for a valuable consideration*, even where the Purchase has been made with *notice* of the prior voluntary Settlement. The Statute receives the same construction, and produces the same effect both in Law and Equity; *and a Purchaser of an Equitable Estate for a [*272 valuable consideration, though with notice, is no more affected by a voluntary Settlement, than a Purchaser of a legal Estate (d). If, therefore, a man after Marriage makes the most prudent Settlement on his Wife and Children, such as every wise man must approve, if the Father is afterwards dishonest enough to sell for a valuable consideration the subject of the Settlement, he may, and the Sale cannot be impeached (e). (1) If, however, the Purchase has been made at an undervalue, it would not invalidate the previous voluntary Conveyance (f).

"I hardly know an instance," says *Lord Hardwicke*, "where a voluntary Conveyance has not been held fraudulent against a *subsequent purchaser* (g)." And where a power is executed under a voluntary Settlement, and that power is afterwards executed for a valuable consideration, the Purchaser will have the benefit of it (h).

If a Man makes a voluntary conveyance of Land, and the Alienee sells the same for a valuable consideration, the Land, the Court inclined to think, was bound (i). So on an Appointment of Property *over which a Man has an unlimited [*273 power as to objects, he who pays a consideration to the voluntary Appointee may constructively be held to be in the same situation as if he had in the first instance paid it to him by whom the Estate has been granted, or the power executed (k).

So, though a voluntary Bond is void as against Creditors, yet

(c) See *White v. Stringer*, 2 Lev. 105, and the cases mentioned by Lord Ellenborough, in his Judgment in *Otley v. Manning*, 9 East, 63, 4.

(d) *Buckle v. Mitchell*, 18 Ves. 110. *Pulvertoft v. Pulvertoft*, 18 Ves. 90. *Metcalf v. Pulvertoft*, 1 Ves. & Bea. 183, 4. *Otley v. Manning*, 9 East. 59. *Hill v. Bishop of Exeter*, 2 Taunt. 69. *Evelyn v. Templar*, 2 Bro. C. C. 148, said to be incorrectly reported, 18 Ves. 91; and see *Ambl.* 288. 1 Eq. Abr. 334. *Powell v. Pleydell*, 14 Jan. 1702, Dom. Proc. Lord Harcourt's MS. Tables, *Doe v. James*, 16 East, 212.

(e) *Hill v. Bishop of Exeter*, 2 Taunt. 82, 3.

(f) *Doe v. Routledge*, Cowp. 705. *Metcalf v. Pulvertoft*, 1 Ves. & Bea. 84. *Doe v. James*, 16 East, 212.

(g) *White v. Sansom*, 3 Atk. 412. Sed vid. *Jennings v. Sellick*, 1 Vern. 467.

(h) *Hart v. Middlehurst*, 3 Atk. 377.

(i) *Sagittary v. Hyde*, 2 Vern. 44. *Rogers v. Langham*, 1 Sid. 133. *Daubeny v. Cockburn*, 1 Meriv. 638.

(k) *Daubeny v. Cockburn*, 1 Meriv. 638.

(1) Vide *Verplanck v. Sterry*, 12 Johns. Rep. 636.

if in consideration of the surrender of the voluntary Bond, the Obligor gives another Bond, such substituted Bond is good against Creditors ; unless the transaction be with a view to defraud Creditors, by an insolvent person for instance, wishing to substitute a valid, for an invalid, Security (*l*).

It is observable, that where a voluntary Conveyance is afterwards defeated by a Sale for a valuable consideration, there is no instance of a satisfaction being decreed against the maker of the voluntary conveyance, or his Estate, unless where there has been some Covenant on which an Action or Suit might be maintained (*m*).

Every voluntary conveyance by a Man for his own benefit is fraudulent against Creditors (*n*), but every voluntary Conveyance is not fraudulent (*o*). A voluntary Conveyance of real Estate, or a Chattel Interest in favour of a Child, by one, not indebted at the time, though he afterwards becomes indebted, is *274] good as against future Creditors, though not against *Purchasers (*p*), (*l*) provided there be no particular evidence, or badge of Fraud, (a power of revocation, for instance) (*q*), or retention of possession (*r*). A voluntary Agreement by one not indebted, nor a Trader, if executed, cannot be invalidated by Creditors ; but if not executed, it seems, it might (*s*). A voluntary Conveyance of Copyholds (unless by the custom of the Manor they are subject to debts,) is not considered as fraudulent, because they are not liable to debts (*t*).

If one voluntarily settle his Estate, with a power of Revocation, with the consent of J. S. who is his own Relation, or one that may be supposed to be at his command, it is fraudulent within the Statute ; but if it be with the consent of others, who cannot be supposed to consent but upon very good grounds, it is not fraudulent within the Statute (*u*).

If a Father takes back an Annuity to the value of the Estate comprised in the Settlement, it is considered as tantamount to a continuance in possession, and Creditors will be relieved against such Settlement. So, if a Bond or Mortgage, or Conveyance of an Estate is made to himself and his Wife, making her joint purchaser, obligee, or grantee, so as to entitle her to the survi-

(*l*) *Ex parte Berry*, 19 Ves. 218.

(*m*) *Williamson v. Codrington*, 1 Ves. 516.

(*n*) *Fitzer v. Fitzer*, 2 Atk. 513, and cited in 2 Ves. sen. 17 ; and see 1 Cox, 446.

(*o*) *Sagittary v. Hyde*, 2 Vern. 44.

(*p*) See *Russell v. Hammond*, 1 Atk. 15, 16. *Holloway v. Millard*, 1 Madd. Rep. 414. *Battersbee v. Farrington*, 1

Swan, 1. 106.

(*q*) *Peacock and Monk*, 1 Ves. 132.

(*r*) *Bates v. Graves*, 2 Ves. 292 ; and see *Stileman v. Ashdown*, 2 Atk. 481, and *Lord Banbury's case*, 2 Freem. 8.

(*s*) *Anon.* MS. 1805.

(*t*) *Matthews v. Feavor*, 1 Cox, 278.

(*u*) *Lord Banbury's case*, 2 Freem. 8.

(1) Vide *Roberts v. Anderson*, 3 Johns. Ch. Rep. 371. *Contra*. S. C. on appeal, 18 Johns. Rep. 515. *Reade v. Livingston*, 3 Johns. Ch. Rep. 502. *Sexton v. Wheaton*, 8 Wheat. 229. *Hildreth v. Sands*, 2 Johns. Ch. Rep. 35. 48, 49.

vorship if he dies in her life-time, yet that is considered as a mere voluntary act with respect to Creditors, and fraudulent, although as between the Wife, and the Heir or Executor, it would prevail (x).

*If one, *indebted at the time*, makes a mere voluntary [*275 Conveyance to a Child, and dies indebted, it is still considered as part of his Estate for the benefit of his Creditors: a Man indebted, conveying voluntarily, being always looked upon as meaning a Fraud on his Creditors (y)

If a Settlement be made after Marriage, in pursuance of a Bond (z), or other agreement, before Marriage (a); upon payment of Money as a portion (b); or a new additional sum of Money; or even upon an Agreement to pay Money, (provided the Money be afterwards paid) this makes the Settlement good and valuable, both at Law and Equity, against Creditors as well as Purchasers (c), provided there be no Fraud, nor great inadequacy (d); for some inadequacy is unimportant (e). The Court will not weigh the consideration in golden scales (f). So, where a Husband who had made no provision on his Wife, agreed that her fortune, which was in Trustees' hands *should [*276 be laid out in a purchase of Lands; the Agreement was not considered as voluntary, and impeachable by a Creditor of the Husband (g). And where a Husband having lived in a state of adultery, and a separation took place between him and his Wife, and upon that occasion the Husband settled Real Estate to the amount of 300*l.* per annum on the Wife for her separate maintenance, and of the Children of the Marriage, the Settlement was not considered as fraudulent under the 13 Eliz. (h).

A Person *before Marriage* may settle all his property upon his intended Wife, even his moveable effects, and the fact of his being indebted at the time, and of her knowing him to be so, will not, even against Creditors, invalidate the Transaction; nor is it necessary that the Husband should receive a Portion with his Wife (i); for the consideration of Marriage protects the Set-

(x) Underwood v. Hithcox, 1 Ves. 280.

(y) Lord Townshend v. Wyndham, 2 Ves. 10, 11; and see 1 Atk. 15, and 94. Taylor v. Jones, 2 Atk. 600. Matthews v. Feavor, 1 Cox, 278.

(z) Jason v. Jervis, 1 Vern. 236.

(a) Hylton v. Biscoe, 2 Ves. 308; and see Dundas v. Dutens, 2 Cox, 236. S. C. 1 Ves. jun. 198; but see Spurgeon v. Collier, Eden's Rep. 1st vol. 61.

(b) Stileman v. Ashdown, 2 Atk. 478. Jones and Marsh, For. 63. S. C. MS. Wheeler against Caryl, Ambl. 121; and see Hylton v. Biscoe, 2 Ves. 308; see Parslowe v. Weedon, Eq. Cas. Abr. 149. Upon this case being cited in Jones and Marsh, MS. the Lord Chancellor

said, "Mr. Vernon grumbled at this case more than any one of the Lord Macclesfield's decisions, and said it was contrary to the uniform practice of the Court, and I do not believe he forgave him as long as he lived."

(c) Browne v. Jones, 1 Atk. 190; see also ex parte Hall, 1 Ves. & Bea. 112. Prec. Ch. 101. 405.

(d) Ward v. Shallet, 1 Vern. 18.

(e) See Jones v. Marsh, For. 65. S. C. MS. Matthews v. Feaver, 1 Cox, 280.

(f) 1 Cox, 280.

(g) Moore v. Rycant, Prec. Ch. 22.

(h) Hobbs v. Hall, 1 Cox, 445.

(i) Browne v. Jones, 1 Atk. 190.

tlement (k). (1) And if Real Estate form part of the Settlement, and after the Marriage the Husband build on the Land or enfranchise Copyholds included in the Settlement, the Creditors will not have the benefit of these Acts by way of charge against the Wife (l).

So, if a Bond is given on Marriage, and receipt of a Portion, conditioned to pay a sum beyond the Marriage Portion, in case of death or insolvency, such Bond is good so far as relates to the Property received with his Wife, but beyond that, is fraudulent *277] *as against Creditors; for no bounds could be set to such Agreements: if a Trader, could make a provision of that sort to the amount of 1,000*l.* he might do so to the amount of 100,000*l.* and take all his property out of the hands of his Creditors (m). All prospective dispositions by a Man of his Property, in the event of his Bankruptcy, different from that which the Bankrupt Law provides, has been held to be void as being a Fraud on that Law (n).

But if a Settlement be made *after Marriage* (a Marriage in Scotland is sufficient) (o), such Settlement, unless it contains a Provision for Debts p), or is in Pursuance of articles before Marriage (q), or under the circumstances before mentioned, is fraudulent (r) against such persons as were Creditors *at the time the Settlement was made* (s); (2) unless it be a *single debt* (t), (3)

(k) *Nairn v. Prowse*, 6 Ves. 759.
Wheeler against Caryl, Ambl. 121.

(l) *Campion v. Cotton*, 17 Ves. 271.

(m) *Ex parte Meaghan*, 1 Sch. & Lefr. 179, and *ex parte Murphy*, Ibid. p. 44, over-ruling what is said by Lord Kenyon in *Staines v. Plank*, 8 T. R. 389; and see *Higginbottom v. Holme*, 19 Ves. 88. *Ex parte Hodgson*, 19 Ves. 206; the marginal note in that case is not expressive of what was determined.

(n) 19 Ves. 88.

(o) *Ex parte Hall*, 18 Ves. 112.

(p) *George v. Milbanke*, 9 Ves. 104.

(q) *Beaumont v. Thorpe*, 1 Ves. 27.

(r) See *Watts v. Thomas*, 2 P. Wms. 304.

(s) *Kidney v. Coussmaker*, 12 Ves. 155; see *Middlecombe v. Marlow*, 2 Atk. 520, and *White v. Sansom*, 3 Atk. 413.

(t) *Lush v. Wilkinson*, 5 Ves. 387.

(1) And so, where a man, before marriage, and without actual fraud, makes a settlement including his wife's fortune, and all his private property, the settlement will be supported against the claims of prior creditors, even though the husband be insolvent at the time. *Tunna v. Trezevant*, 2 Des. 264. And conveyances by a husband, in trust for his wife and her issue, and purchases made on their behalf, will not be deemed voluntary and fraudulent, where the husband had received and applied to the payment of his debts, &c. the property of the wife, though the values be not exactly the same. *Taylor v. Heriot*, 4 Des. 227.

(2) Vide *Reade v. Livingston*, 3 Johns. Ch. Rep. 492. *Bayard v. Hoffman*, 4 Johns. Ch. Rep. 450. It seems to be well established, that a post-nuptial voluntary settlement made by a man not indebted at the time, upon his wife, is valid against subsequent creditors. *Sexton v. Wheaton*, 8 Wheat. 229. But vide *Taylor v. Heriot*, 4 Des. 232. A deed of gift from the husband to the wife, without the intervention of a trustee, is not, from that circumstance, void; and such deeds will be supported, provided they do not prejudice prior creditors, or subsequent *bona fide* creditors without notice. *Ex parte Elms*, 3 Des. 158.

(3) It seems from the report of the case of *Peigne v. Snowden*, 1 Des. 591, that a deed of settlement, after marriage, in favour of the wife, is fraudulent and void, where there is a single creditor only, at the time of execution.

or unless the debt be secured by *Mortgage*, in which case it would not affect the Settlement (*u*) ; for to do that, it seems, the Party must have been *insolvent* at the time (*x*) ; but it is observable, that if (with the exceptions alluded to,) *there be Credi- [*278 tors at the time of such Settlement, and the Settlement is on that account declared fraudulent, the property so settled, becomes part of the Assets, and all *subsequent* Creditors are let in to partake of it (*y*) ; and in one case, a *subsequent* Creditor filed what is called a *fishing* Bill, in order to prove debts *antecedent* to the Settlement (*z*), and thus establish a fund for the payment of his own debt (1).

By the Common Law, fraudulent Gifts or conveyances were avoidable by Persons who were Creditors at the time such Gift or Conveyance was made ; but such Gifts or Conveyances were not avoidable by persons who became Creditors subsequent to the making of them (*a*).

And though a *voluntary* Deed, a Bond for instance, is void against Creditors, yet if *arrears* have accrued under such Bond, these will form a valuable consideration ; and if a new Bond, or the Assignment of a Lease, is given for such arrears, the same may be sustained against Creditors (*b*).

So, in those cases where Property belonging to the Wife, in Trustees' hands is sought by the Husband by a Bill in Equity, and the Court directs a Settlement, such Settlement will be good against Creditors (*c*).

*A Widow, it has been holden, may, previous to a se- [*279 cond Marriage, make a Settlement in favour of the Children of the first Marriage, and of the second Marriage ; and the same will not be considered a voluntary Settlement, or as fraudulent and void against subsequent Creditors and Purchasers (*d*).

It seems that a voluntary assignment of a *chose in Action*, or

(*u*) Stephens against Olive, 2 Bro. C. C. 30.

(*x*) Lush v. Wilkinson, 5 Ves. 384 ; and see East India Company v. Clavel, Gilb. Rep. 37.

(*y*) See Taylor v. Jones, 2 Atk. 600 ; and see what is said of that in Dundas v. Dutens, 1 Ves. jun. 198. Arg. Mountague and Lord Sandwich, mentioned in note to Kidney v. Coussmaker, 12 Ves. p. 156. See also Walker v. Burroughs, 1 Atk. 93.

(*z*) Lush v. Wilkinson, 5 Ves. 384 ; and see what is said of that case in Kid-

ney v. Coussmaker, 12 Ves. 155.

(*a*) Twine's case, 3 Co. 83. a. Upton and Bassett, Cro. Eliz. 444. Dyer, 294, 5.

(*b*) Gilham v. Locke, 9 Ves. 612. Stiles v. Attorney General, 2 Atk. 152.

(*c*) Wheeler against Caryl, Ambl. 191.

(*d*) Newstead v. Searles, 1 Atk. 264 ; but see the doubt of Lord Mansfield as to this position, in Chapman v. Emery, 1 Cowp. 280.

(1) The opinion of the chancellor, in the case of *Reade v. Livingston*, 3 Johns. Ch. Rep. 481, seems to correspond fully with all the branches of the doctrine contained in the text, except as to that which relates to the question of insolvency of the grantor. He says, "The presumption of law in this case, does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party."

Stock, which could not at the time be brought within the reach of Creditors, could not be set aside by them (e).

There are *dicta*, that a settlement after Marriage, reciting a parol Agreement before Marriage, is not fraudulent against Creditors, provided there is distinct proof of the parol Agreement; but it does not appear that the point has been directly decided. (1) It was discussed in *Dundas* and *Dutens* (f); but Lord Thurlow, though inclined that it should stand good, said it was a mere matter of curiosity, if the first point was against the Plaintiff, as it was. A case in *Levinz* (g) is there referred to; a *dictum*, not a decision, that the Settlement was void; for though a parol promise before Marriage was proved, and a Settlement made after the Marriage, yet it was not made with such a correspondence to the parol promise as to appear to have been made in execution of it; and therefore it was held that the Court could not connect them, but that the Settlement must stand upon *280] its own footing, as a mere Settlement after Marriage (h).

A voluntary Settlement binds the Party making it, nor can he alter it, how much soever he may be inclined to do so, unless there be a power of revocation (i). (2) "He must lie down under his own folly." It is void only against Creditors; and, only to the extent in which it may be necessary to deal with the Estate for their satisfaction, it is as if it never had been made. To every other purpose it is good; satisfy the Creditors, and the Settlement stands (k). Nor would a subsequent Will avoid a voluntary Deed kept by the maker, and never cancelled (l). A voluntary Settlement may be surrendered voluntarily without consideration (m).

Weakness of mind alone, without fraud, does not appear to be a sufficient ground to invalidate an Instrument. According to Sir Joseph Jekyl, "if a *weak* Man gives a Bond, if there be no

(e) See *Grogan v. Cooke*, 2 Ball & Bea. 330. *Dundas v. Dutens*, 1 Ves. jun. 196, and what Lord Thurlow said, stated more correctly in *Grogan v. Cooke*, *ut supra*, p. 233; see also *Battersbee v. Farrington*, 1 Swanst. 113.

(f) 1 Ves. jun. 196.

(g) 2 Lev. 146.

(h) *Randal v. Morgan*, 12 Ves. 74.

(i) See *Ambl.* 266.

(k) 12 Ves. 103. 106. *Curtis v. Price*. *Whaley v. Norton*, 1 Vern. 483.

(l) *Boughton v. Boughton*, 1 Atk. 625. As to the effect of cancelling a voluntary settlement, see *North v. Gillingham*, East, 9 Geo. 2. 1736, MS.

(m) *Prec. Ch.* 62.

(1) In the case of *Reade v. Livingston*, 3 Johns. Ch. Rep. 491, the chancellor expressed a strong doubt whether a post-nuptial settlement could be held valid as against creditors, by the mere recital in it, of a prior parol agreement.

(2) Vide *Bunn v. Winthrop*, 1 Johns. Ch. Rep. 329. A voluntary settlement fairly made, is always binding on the grantor, unless there is clear and decisive proof that he never parted, or intended to part, with the possession of the deed; and if he retains it, there must be other circumstances than merely this fact, to show, that it was not intended to be absolute. *Souverye v. Arden*, 1 Johns. Ch. Rep. 240. And so, if the deed be retained by the grantor until his death, it is good. *Bunn v. Winthrop*, *ut supra*.

Fraud, or breach of Trust in the obtaining it, a Court of Equity would not set it aside only for the weakness of the obligor, if he be *compos mentis*; for the Court will not measure the size of people's understandings or capacities, there being no such thing as an equitable incapacity where there is a legal capacity" (n).

**Lord Hardwicke*, also, clearly held that it was not sufficient to set aside an Agreement, to suggest weakness and indiscretion in one of the Parties who had engaged in it; for supposing it to be in fact a very *hard and unconscionable bargain*, yet if a Person will enter into it with his eyes open, Equity will not relieve him, unless he show fraud in the Party contracting with him, or some undue means made use of to draw him into such an Agreement (o). *Lord Thurlow*, however, according to some of the Reports, appears not to have concurred in this doctrine, and observed "that in almost every case upon this subject a principal ingredient was a degree of weakness, *short of legal incapacity*; and that in the case of *Osmond and Fitzroy* no relief probably would have been given if the Court had not considered *Lord Southampton* as more liable to imposition than the generality of Mankind (p)." It seems, however, that the relief in *Osmond and Fitzroy* was given, not on the ground of the weakness of the Party, but principally on account of the relation in which the Parties stood; the servant who obtained the Bond in that case having been originally hired to take care of the young Lord while an Infant, or during his travels, which Trust, the Court thought, continued so long as the servant remained in the service; and, indeed, in the Report of *Griffin and Devenille* by Mr. *Wooddeson*, who was counsel in the cause, it appears that *Lord Thurlow* admitted that the Court would not set aside the voluntary deed of a weak man who is not *non compos*, [*282 nor any deed of improvidence or profuseness, for those reasons merely where no fraud appears, as was laid down by *Sir Joseph Jekyl* in *Osmond and Fitzroy*; but he said, that "*Sir Joseph Jekyl* might have been pleased to add, that from these ingredients there might be made and evidenced a collection of fact, that there was fraud and misrepresentation used;" and accordingly, in this very case, *Lord Thurlow* decided that the circumstances of the Case, and the situation of the Parties, collectively, showed that the Plaintiff was deceived, abused, and circumvented, and he declared the Deed which had been obtained to be

(n) *Osmond and Fitzroy*, 3 P. Wms. 131. S. C. MS. under the name of *Osmyn v. Duke of Cleveland*. See *Grounds and Principles of Law and Equity*, p. 205, & *Bridgman v. Green*, *Wilmot's Rep.* 61, and what is said arg o. 5th vol. *Erskine's Speeches*, p. 9, 10. *Carol v. Chamberlaine*, 14 July, 1721. Dom. Proc.

(o) *Willis and Ternegan*, 2 Atk. 251; see also *Stanhope v. Cope*, 2 Atk. 231, and what *Lord Eldon* says in *Huguenin and Baseley*, 14 Ves. 290; but see *Anon.* 2 Ves. 408, and what is said post.

(p) *Griffin v. Devenille*, mentioned in Mr. *Cox's* note to 3 P. Wms. 130, n. 1.

void. (1) He further observed, (according to Mr. Wooddeson's note,) that the case of *Osmond* and *Fitzroy* could not be supported, but on the mixed ground of Lord Southampton's extreme weakness of understanding, as well as the situation of *Osmond* (q). Of the two accounts of what Lord Thurlow said, Mr. Cox's appear to differ much from Mr. Wooddeson's : from Mr. Cox's it might be inferred that weakness of mind, short of being *non compos mentis*, may be a ground for setting aside a deed ; but from the other it may fairly be inferred that weakness of mind alone would not be sufficient to set aside a Deed ; and that doctrine appears to be most conformable with authorities. The Court will not measure the degrees of understanding, and say, that a weak Man, provided he is out of the reach of a Commission, may not give as well as a wise Man ; but though this Court *283] disclaims any such Jurisdiction, yet where a Gift is immoderate, and bears no proportion to the circumstances of the Giver ; *ubi modus non adhibetur, ubi non refertur ad facultates*, where no reason at all appears, or the reason given is falsified, and proved to be a fiction, and the Giver is a weak Man of a facile, easy temper, liable to be imposed upon, this Court will look upon such a Gift with a very jealous eye, and very strictly examine the conduct and behaviour of the Persons in whose favour it is made. If it see that any arts or stratagems, or any undue means have been used by them to procure such a Gift ; if it see the least speck of imposition at the bottom, or that the Donor is in such a situation with respect to the Donee as may naturally give an undue influence over him, if there be the least scintilla of Fraud, in such a case the Court will and ought to interpose ; and by the exertion of such a Jurisdiction, they are so far from infringing the right of alienation, which is the inseparable incident to property, that it acts upon the principle of securing the full, ample, and uninfluenced enjoyment of it (r).

Excessive old age with weakness of mind, may be a ground for setting aside a Conveyance obtained under such circum-

(q) 3 Wooddeson's Lect. Append. p. 18.

(r) *Bridgman v. Green*, Wilmot's Cases, 61.

(1) A deed executed on the day of his marriage, by a man of weak intellects, and habitual drunkenness, conveying his real estate to his brother, for the consideration of love and affection, without any reservation for himself and family, will be considered as having been founded on a secret trust between the brothers, and equity will raise a trust, and will not permit the deed to take effect as an absolute conveyance. *Rutherford v. Ruff*, 4 Des. 350. So, a deed executed by a weak man, in very necessitous circumstances, whereby he transferred his rights for a most inadequate consideration, will be set aside in equity. *Rutherford v. Ruff*, *ut supra*. *Butler v. Haskell*, 4 Des. 651. *Bunch v. Hurst*, 3 Des. 273. A deed of gift to particular children, will not be set aside on the ground of an unequal or unjust division of the property : Some incompetency of mind at the time of executing the deed, or some imposition practised on the donor, must be shown. *Roland v. Sullivan*, 4 Des. 518.

stances ; but where a Lease was obtained from a woman who was upwards of seventy-five years of age for much less than the value of the Lease, still it was held unimpeachable, and that old age, without some proof of fraud, would not invalidate a transaction (s).

Underhand Agreements are also relieved against in *Equity [*284 ty. If a Debtor compromise with his Creditors, and a Deed of Composition is signed, or acted upon as if signed by the Creditors, and one of the Creditors, *unknown to the rest* (if known to the Creditors it would be different) (t), obtains from his Debtor a collateral security for his Composition, this security is fraudulent and invalid (u) ; and bad at Law (x), as well as in Equity. It has even been held that where a Creditor apparently accepts, and gives a receipt for, a Composition, to enable the Debtor to deceive his other Creditors, but takes a security for the rest of the demand, such security is void, although there is no joint agreement among the Creditors, nor any one is in fact deceived by the Fraud (y). But such agreement is bad only, it seems, as to the Creditors, and cannot be relieved against at the instance merely of the Debtor, who has himself been guilty (z).

Costs in these Cases are of course, and are always given on grounds of public policy (a).

Under the head of *underhand Agreements* may be ranked *Marriage-Brokage Bonds*.

The *Civil Law* allowed the *prozenetae*, or match-makers, to receive a reward for their pains (b) ; and *Lord Somers [*285 decreed in favour of a Bond for procuring a Marriage, the procuring of a Marriage being a good consideration at Law for an *Assumpsit* (c), but his decree was reversed in the *House of Lords* (d) : and it is now clearly settled, that Equity will relieve against Bonds given for the procuring of a Marriage (e) ; and

(s) 1 Ves. jun. 19. Lewis v. Pead ; see on this subject White v. Small, Ch. Cas. 103.

(t) See Hibblethwaite's case mentioned 13 Ves. 586, 7. & S. C. MS. Mawson v. Stock, 6 Ves. 300.

(u) Child v. Danbridge, 2 Vern. 71. Middleton v. Lord Onslow, 1 P. Wms. 768. Spurret v. Spiller, 1 Atk. 105. Chesterfield and Jansen, 2 Ves. 156. Sadler and Jackson, Ex parte. 15 Ves. p. 52 ; and see Eastabrooke, v. Scott, 3 Ves. 406. Constantein v. Blache, 1 Cox, 287.

(x) See Jackman v. Mitchell, 13 Ves. 586, and Leicester v. Rose, 4 East. 372, over-ruling Feize v. Randall, 6 T. R. 146.

(y) Fawcett and another v. Gee, 3 Anstr. 910.

(z) Small v. Beachley, 2 Vern. 602 ;

but see Cecil and Plaistow, 1 Anstr. 202, and Fawcett and Gee, 3 Anstr. 910.

(a) Jackman v. Mitchell, 7 April 1807, MS. S. C. 13 Ves. 586.

(b) 1 Bro. Civil Law, 79.

(c) See Grisley v. Lothar, Hob. 10, and what Holt, Ch. Just. says, in Hall v. Potter, 3 Lev. 411 ; but see Collins v. Blanterne, 2 Wils. 347.

(d) Potter v. Keen, or Hall, Show. Cas. Parl. 76, noticed 3 P. Wms. 76, and 392.

(e) Drury v. Hook, 1 Vern. 412. Arundel v. Trevilian, Ch. Rep. 87. Hall v. Potter, 3 Lev. 411. Sho. P. C. 76. Glanville v. Fenning, 3 Ch. Rep. 18. Toth. 27. Cole and Gibson, 1 Ves. 507. Smith v. Aykwell, 3 Atk. 566.

not only decree such Bonds to be delivered up, but also a sum paid, to be refunded (*f*), they being introductive of infinite mischief (*g*); and as relief in these cases is given on grounds of public convenience, such Bonds do not admit of *confirmation*, though, perhaps, (a sort of confirmation) the remedy of the Party may be *released* (*h*). The Court on these occasions does not interpose in respect of the particular damage to the Party, but from a public consideration, Marriage greatly concerning the Public (*i*). Such Bonds tend to introduce improvident Marriages; and every Contract relating to Marriage ought to be free and open (*k*): and on this ground it is that though the match be a proper one, yet the Court sets the Bond aside. But for the ingredient of public policy, the Court would not set such *286] Bond aside at the instance of the *obligor, who is *particeps criminis*; and where the obligor has sought relief, costs have not been given (*l*).

A Bond given for assisting a clandestine Marriage has been set aside, though given voluntarily after the Marriage, and without any previous agreement for the same (*m*).

Another sort of underhand Agreement is, where a Man sells his Interest to procure another an office of trust or service under the Crown; it is a contract of turpitude, and cognizable by the Jurisdiction of Equity (*n*); as where money was advanced for procuring a commission in the Marines, and the Purchaser was discovered to have worn a livery, he was discarded, and it was held that he was entitled to a Decree for the Money paid, with Interest. "If," says the Lord Keeper *Henley*, "there is no precedent of such a determination, I have no scruples to make one, and shall glory in it" (*o*).

Fraudulent Alienations by Executors will be relieved against. Executors are, in Equity, mere Trustees for the performance of the Will, but in many respects, and for many purposes, third persons are entitled to consider them as complete owners (*p*). The power they possess over the Property of their Testator is very large, both at Law and in Equity, and it is considered necessary, the better to enable them to execute their Trust, and *287] prevent the general *inconvenience of entangling third persons in inquiries as to the application the Executors may pro-

(*f*) *Smith v. Bruning*, 2 Vern. 392.

(*g*) 3 P. Wms. 394.

(*h*) *Shirly v. Martin*, mentioned in note 1, to *Roberts and Roberts*, 3 P. Wms. 74, and noticed 1 Fonbl. Eq. 265.

(*i*) *Law and Law*, For. 142. S. C. MS. and more fully *Debenham v. Ox*, 1 Ves. 277. *Cole v. Gibson*, 1 Ves. 506.

(*k*) *Roberts v. Roberts*, 3 P. Wms. 76. *Debenham v. Ox*, 1 Ves. 277.

(*l*) 1 Ves. 277.

(*m*) *Williamson v. Gihon*, 2 Sch. & Lefr. 357.

(*n*) *Whittingham v. Burgoyne*, 3 Anstr. 900.

(*o*) *Morris v. M'Culloch*, Ambl. 432. S. C. 2 Eden's Rep. 190; and see *Law v. Law*, For. 140. *Harrington and Du Chatel*, 1 Bro. C. C. 124; and see the late Act, 49 Geo. 3. c. 126.

(*p*) *Hill and Simpson*, 7 Ves. 166; and see *Taylor v. Hawkins*, 8 Ves. 209.

pose to make of the Money produced by the conversion of the Assets (*q*); nor is it of any consequence, with reference to the power of Executors, whether the Personal Estate is bequeathed on a Trust or not.

Though an unsatisfied Legatee has an interest in the Estate of his Testator, and a right to have it applied to answer his demands in a due course of Administration; yet, so exclusive is the power of the Executor, that the Legatee cannot institute a Suit against the Debtors to the Testator's Estate, for the purpose of compelling them to pay their Debts in satisfaction of his Legacy; unless by *collusion* between the Representative and Debtors, or other collateral circumstances, a distinct ground is given for a Bill by the Legatee against the Debtors (*r*); for there is no privity between the Legatee and the Debtors, who are answerable only to the personal Representative of the Testator.

If, however, a person dealing with an Executor, is aware that the Executor is *misapplying* the Testator's Property, a Court of Equity will in general, (but it must be a very strong case,) (*s*) interfere on behalf of Persons beneficially entitled under the Testator's Will (*t*). If, for instance, one concert with [*288 an Executor, by obtaining the Testator's effects at a nominal price, or at a fraudulent under-value, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the Executor (*u*), or in any manner contrary to the duty of an Executor, such concert will involve such fraudulent Purchaser, and render him liable for the full value (*x*). It has been said, indeed, that even if there has been only *gross negligence* in the Purchaser, though not direct fraud, Legatees may set aside the Purchase (*y*).

If an Executor should release a debt of 100*l.*, for one shilling, that would not bind a Creditor; but in case there is no other Creditor except the Executor himself, it would bind him (*z*). If an Administrator grants a Lease to a Person who has notice

(*q*) See *Humble and Bill*, 2 Vern. 444, the doctrine of which case appears to have been followed, though the decree was reversed (1 Bro. P. C. 74,) in the House of Lords; see *Nugent v. Gifford*, 1 Atk. 463, 4. S. C. 2 Ves. 269. *Elliot v. Merriman*, 2 Atk. 42. *Mead and Lord Orrery*, 3 Atk. 237. *Peacock v. Monk*, 1 Ves. 131. *Brickley v. Donnington*, 2 Eq. Abr. 253. *Franklin v. Ferne*, Barn. 32.

(*r*) *Redd.* Tr. Pl. 129, and cases there cited.

(*s*) *Crane v. Drake*, 2 Vern. 616. *Ewer v. Corbet*, 2 P. Wms. 148. *Jacomb v. Harwood*, 2 Ves. 269. *Dickenson v. Lockyer*, 4 Ves. 42, 3.

(*t*) See *Franklyn v. Ferne*, Barn. 30, 33. *Newland v. Champion*, 1 Ves. 105. *Elmalie against M'Aulay*, 3 Bro. C. C. 626. *Utterson v. Maire*, 4 Bro. C. C. 270. S. C. 2 Ves. jun. 95. *Doran v. Simpson*, 4 Ves. 665.

(*u*) As in *Scott v. Tyler*. 2 Dick. 725, and *Bonney v. Ridgard*, 1 Cox, 145.

(*x*) See *M'Leod and Drummond*, 17 Ves. 167. *Elliot v. Merriman*, Barn. p. 78. *Bonney v. Ridgard*, 1 Cox, 145.

(*y*) *Scott v. Tyler*, 2 Dick. 725. *Hill and Simpson*, 7 Ves. 152.

(*z*) *Sic dict.* *Noel v. Robinson*, 1 Vern. 455.

that a sale of the Premises were required by the Parties beneficially interested, it will be set aside (a).

Residuary or general Legatees, however, and, under some circumstances, *Co-Executors* (b), are not permitted to question the disposition which the Executors have made of the Assets; but *Creditors, specific or pecuniary Legatees* (c), may follow *289] either *legal or equitable Assets into the hands of third persons to whom Fraud is imputable. Why a *Residuary Legatee* should not, in such cases, be allowed to follow the Assets, is not very obvious (d).

Though a transaction with an Executor or Administrator be suspicious, yet if there has been long possession by the Purchaser, or the Person under whom he takes, the Court will not relieve (e).

Fraudulent Agreements on Marriage, are relieved against in Equity; as where one affects to put the Party contracting for Marriage in one situation by the Articles, and puts that Party in another, and a worse situation, by a *private Agreement*. If a fortune paid, is in part privately received back; or a Bond of Indemnity is given (f), underhand Agreements of this description are always set aside (g); for that which is the open and public treaty and agreement upon Marriage must not be lessened, or in any way infringed by any private treaty or agreement (h).

Where, therefore, a Son, on his Marriage, was to have 3,000*l.* Portion with his Wife, and privately, without notice to his Parents who treated for the Marriage, gave a Bond to the Wife's Father to pay back 1,000*l.* of the Portion, seven years after-*290] wards, this *Bond was held void in Equity; nor made effectual by being assigned to Creditors (i).

So where a Father, on the Marriage of his Son, gave a Bond for 150*l.* per Annum, the private agreement of Husband and Wife being that he should only be called upon for 100*l.* per Annum, the Bond being given to deceive the Uncle of the Lady, it was held that the Father could not file a Bill to have this Bond delivered up, though the Uncle made no Settlement on his Niece (k).

(a) *Drohan v. Drohan*, 1 Ball & Beatty, 185.

(b) *M'Leod and Drummond*, 14 Ves. 353, and S. C. 17 Ves. 172.

(c) *Hill v. Simpson*, 7 Ves. 152, appears to be the first case in which a mere pecuniary Legatee ever succeeded in following the assets into the hands of third persons. *M'Leod v. Drummond*, 14 Ves. 361. & S. C. 17 Ves. 169.

(d) See what Lord Eldon says in *M'Leod and Drummond*, 17 Ves. 169, 170.

(e) *Andrew against Wrigley*, 4 Bro. C. C. 125.

(f) *Palmer v. Nave*, 11 Ves. 167; and see *Chesterfield and Jansen*, 2 Ves. 156.

(g) *Redman v. Redman*, 1 Vern. 248. quot. 2d vol. Black. Com. 309.

(h) *Lamlee v. Hannam*, 2 Vern. 499.

(i) *Turton v. Benson*, 1 P. Wms. 496.

(k) *Pitcairn v. Ogbourne*, 2 Ves. 375.

So if a Father takes a Bond from a Daughter entitled to a Fortune, unknown to her Husband, it is considered to be in the nature of a Marriage-Brokerage Bond, and will be ordered to be delivered up (l).

Upon the same principle, not only Bonds, but a Lease granted by a Tenant in Tail, in consideration of procuring a match, has been set aside at the suit of a Remainder-man (m).

A Bond by a young Woman secretly given to a Man, conditioned to pay him a sum of Money if she did not marry him within a certain period after the death of her Father, he giving a Bond to the same effect on his part to marry her, has been set aside, and principally on the ground that it was a fraud on the Parent, who was ignorant of the Bond, and disapproved of the Marriage. The Fraud consists in this; that the Father thinks his child has submitted to his opinion of the match, and in that opinion makes a provision for her to advance her in Marriage, which, had he known *of the Bond, he would not have [*291 done, or might have done in such a manner as would have prevented the Marriage; it is therefore in fraud of the Father's right of disposing of his Fortune among his Children according to their deserts (n).

In the cases we have mentioned of Portions secretly returned, in part, there is no Fraud between the contracting Parties, but on the Parents or Friends of one of them, who are deceived by settling Lands equal to the Portion that appears to be given, and for that reason such Bonds are set aside (o). Although the Husband were a Party to the Fraud, yet his Interest is not affected, since it is impossible to make him liable in respect thereof without involving the Wife and Children, and the Family in the deceit that has been practised. If the Wife be dead without Issue the Rule may be different (p).

Where, however, A. treated for the Marriage of his Son, and in his settlement on the Son there was a power reserved to the Father to jointure any wife whom he should marry, in 200*l.* per Annum, paying 1,000*l.* to the Son, and afterwards the Father treated about marrying a second Wife, the Son agrees with the second Wife's Relations to release the 1,000*l.* and does release it, but takes a private Bond *from the Father for the pay- [*292 ment of this 1000*l.* the Chancellor would not set aside the

(l) Anon. 2 Eq. Abr. 187.

(m) *Stribblehill v. Brett*, 3 Vern. 446.

(n) *Woodhouse v. Shepley*, 3 Atk. 535; and see on this subject *Cock v. Richards*, 10 Ves. 429. S. C. MS. A wagering contract for fifty guineas, that the Plaintiff would not marry within six years, has been held at Law to be prima facie in restraint of marriage and void; no circumstances appearing to show that

such restraint was prudent and proper in the particular instance. *Hartley v. Rice*, 10 East, 22; and see *Low and Peers*, 3 Burr 22. 25. & S. C. Wilmet's Rep. 364.

(o) *Woodhouse v. Shepley*, 3 Atk. 539; and see on this subject *Cock v. Richards*, 10 Ves. 429. S. C. MS.

(p) *Thompson v. Harrison*, 1 Cox. 344.

Bond, because it would be injurious to the first marriage, which being prior in time, was to be preferred (q).

In Marriage Contracts, the happiness of the Parents and Children are so much at stake, that it has been held, that whoever treats fraudulently on such an occasion shall not only not gain, but even lose by it. As where upon a treaty for a Marriage the Woman not having so great a portion as the Man insisted upon, prevailed upon her brother to let her have 160*l.* to make up her portion, and gave him a Bond for the repayment of it; the marriage was had, and the Husband, who knew nothing of the Bond, died without Issue. The Wife survived, and after her death, and the death of the brother, the Defendant, his Executor, put the Bond in suit against the Plaintiff, her Executor; but the Bond was set aside (r). A *quære* is put by the Reporter, if the condition of the Bond had been, that in case the woman survived her husband, she should pay it, whether she could have been relieved; but Lord Thurlow (s) thought this would have made no difference.

In Lord Harcourt's *M.S. Tables* he notices the following strong case in the House of Lords:

"A. makes an absolute Conveyance to B. for 1,500*l.* B. executes a defeazance upon payment of 1,500*l.* within sixteen *293] years. B. on Marriage settles it as *an absolute Estate upon the Wife, and the Issue of that Marriage; and there being proof that A. made the Conveyance to enable B. to get a fortune, through another Lady, and not the Wife he really married, it was decreed that A. was bound as *particeps criminis*; and that, though the Wife's Father had notice of the Defeazance before the Settlement was made (t).

Upon a Treaty of Marriage between A. and B. the Mother of A. being entitled to one third of a Farm, and Stock of which A. was in possession, represented to the Father of B. that the Farm and Stock belonged to A. and that A. was not indebted to any body. The Mother afterwards takes a Bond from A. for the amount of her one third part of the Farm and Stock, &c. which were settled on the Marriage. The Bond was relieved against as being a Fraud on the Marriage; and it was held, that the Parent is not a necessary party to such a Bill, but is a competent Witness to prove the Fraud on a Bill filed by the Husband and Wife (u).

It seems doubtful whether the wilful concealment by a Cre-

(q) Roberts v. Roberts, 3 P. Wms. C. C. 646.
66.

(r) See Gale v. Lindo, 1 Vern. 475. S. C. cited by Lord Chan. in Neville and Wilkinson, 1 Bro. C. C. 546; and see what is said in Wilmot against Woodhouse, 4 Bro. C. C. 230.

(s) See Neville v. Wilkinson, 1 Bro.

(t) The Decree was affirmed in the House of Lords by 8 Lords in opposition to 7. Lord Cowper and Lord Harcourt were against the Decree, Lord Ch. J. Parker for it. Webber v. Farmer, 21 Jan. 1718.

(u) Scott v. Scott, 1 Cox, 366.

ditor of his Debt from the Parent of a Woman upon a Treaty of Marriage between her and the Debtor is *alone* sufficient to vitiate the Debt (*w*).

In a Case where a Widow, on the Marriage of her Son, agreed to release her jointure, that he might make a Settlement, and the Son *privately* agreed to *assign a Leasehold Estate [*294 to his Mother, the Agreement of the Son was set aside as fraudulent (*x*).

Where a Mortgagee had accepted several Bonds for Interest due, and by contrivance with the Mortgagor represented, on his treaty of Marriage, to the Woman's Father, on his inquiring what was due, that only the principal Mortgage Money was due, Redemption was allowed, on payment only of what was so represented to be due (*y*).

Other *Frauds on Marriage* besides those already noticed, are redressed in Equity. A Woman, while unmarried, may dispose of and convey her property in any manner she pleases; and a Husband whom she afterwards marries, without any settlement made by him, or any inquiry concerning her fortune, cannot impeach a Conveyance which she has made of her property for her own separate use, provided the Conveyance was not attended with such circumstances as prove the same to be fraudulent (*z*).

So, if a Feme Sole, with the privity of her intended Husband, conveys, before Marriage, a term for years in trust for herself, it is out of her Husband's power; but if a Feme Sole *secretly, on the eve of Marriage, without the knowledge of her intended Husband*, convey her Property to a mere Stranger (*a*), or a Term for years, in Trust for herself, this does not exclude the Husband's right (*b*). But though, if a *Woman on the [*295 eve of Marriage secretly conveys her property without the privity of the intended Husband, it will be considered as a Fraud (*c*); yet where the Deed had been made in contemplation of a Marriage with *another* Person, and with the consent of that person, it was held to be unimpeachable (*d*).

And where a Widow previous to a second Marriage, and to the Treaty for the same, made a *suitable provision* for the Issue

(*w*) Ibid.

(*x*) *Lamlee v. Hannam*, 2 Vern. 465. 499.

(*y*) *Prec. Chan.* 132.

(*z*) See *Bowes v. Strathmore*, House of Lords, 6 Bro. P. C. 436. *Toml. Edit.* S. C. 2 Bro. C. C. 345. 2 Cox, 90.

(*a*) *Lanes v. Newman*, 2 Ch. Rep. 41. *Blanchett v. Foster*, 2 Ves. 264.

(*b*) *Draper's Case*, 2 Freem. 29, 30.

Pitt v. Hunt, 1 Vern. 18. S. C. 2 Ch. Cas. 73.

(*c*) *Cotton v. King*, 2 P. Wms. 360. *Poulson v. Wellington*, 2 P. Wms. 535. *Carleton v. Earl of Dorset*, 2 Vern. 17.

(*d*) *Strathmore v. Bowes*, 2 Bro. C. C. 345. Decree affirmed in the House of Lords, 3 March, 1789. S. C. 1 Ves. jun. 28. contra. *Edmonds against Donnington*, mentioned in *Carleton v. Earl of Dorset*, 2 Vern. 17.

by her first Husband, this was held to be valid (e); but a power reserved to herself to dispose of the remainder of a Term settled on herself and Child, after the decease of herself and Child, was determined to be void (f).

Bonds to be paid if the obligor should marry such a Man (g); or being a Widow, if she should marry again (h), have been ordered to be delivered up to be cancelled, as being contrary to the nature and design of Marriage, which ought to proceed from free choice, and not from any compulsion.

Awards, if fraudulently obtained, may be set aside in Equity (i), if the reference has not been made a Rule of Court (k), under the *296] Statute (9 and 10 W. 3, *c. 15,) and also where it has been made a Rule of a Court of Common Law, and such Court on a motion by one Party to set aside the Award, and on a motion by the other Party to commit for a contempt in not performing the Award, has been divided in opinion, and, consequently, no order was made; for in such case the Party would be wholly without relief, unless a Court of Equity could relieve (l).

Awards made in causes depending upon a submission to Arbitration in Court, have been held not to be within the Statute, and that though the submission has been made a Rule of Court, the Party may file a Bill to set aside the Award (m). It is the present practice of the Common Law Courts, in all cases, upon a motion to make the submission to the Award a Rule of Court, to make it part of the Rule, "that the Parties shall not file any Bill in Equity against the Arbitrators, or against each other." What is the effect of such a Rule, and whether it precludes the Party from applying to Equity, does not appear to be conclusively determined in a Court of Equity (n). These Rules, if binding, would operate as an Injunction to restrain proceedings in a Court of Equity, and might be denominated a Common-Law Injunction. An Agreement in an Arbitration Bond, that Parties should not file a Bill in Equity, would not, it seems, avail; for Courts of Equity hold that a Man cannot, by an Agreement to refer, deprive himself of the right to apply to a Court of *297] *Equity (o); and will the Rule of Court have an effect

(e) *Cotton v. King*, 3 P. Wms. 357, 674. *Hunt v. Matthews*, 1 Vern. 408.

(f) *Blithe's Case*, 2 Freem. 91, 2.

(g) *Key v. Bradshaw*, 2 Vern. 102.

(h) *Baker v. White*, 2 Vern. 215.

(i) *Norgate v. Ponder*, Nels. 4. 1 Vern. 157. *Harris v. Mitchell*, 2 Vern. 485. *Burton v. Knight*, 2 Vern. 514. *Tittenson v. Peat*, 3 Atk. 529. *Chicot v. Lequesne*, 2 Ves. 315. *Champion against Winham*, Amb. 246. *Knox v. Symonds*, 1 Ves. jun. 370.

(k) *Chicot v. Lequesne*, 2 Ves. 315.

(l) *Chicot v. Lequesne*, 2 Ves. 317. See also 2 Ves. 181.

(m) *Lucas v. Wilson*, 2 Bar. 701. *Lord Lonsdale v. Littledale*, 2 Ves. jun. 453. *Bumb.* 265; and see *Gwinett v. Bannister*, 14 Ves. 532.

(n) *Nicholls v. Chalie*, 14 Ves. 268. 270; and see *Hampshire v. Young*, 2 Atk. 155.

(o) *Nicholls v. Chalie*, 14 Ves. p. 270, and what is said in *Street v. Rigby*, 6 Ves. 815. See vide 2 Atk. 396 412, as to an Agreement that no Bill should be filed against the Arbitrators.

which the Agreement of the Parties could not accomplish? It seems that in these cases, according to the opinion of Lord Ellenborough, a Motion, supported by Affidavit, might be made to the Court of Common Law, for discharging so much of the Rule for making the submission to the Award a Rule of Court, *as restrained the Defendant from filing a Bill in Equity* (p); for the Bill in Equity which the Rule of Court contemplates is a Bill filed to postpone the payment of a debt, or other purposes of vexatious delay (q); so that Lord Ellenborough seemed of opinion with Lord Rosslyn (r), that it is not the words of the Act, but the terms of the Rule of Court, which prevents the party filing a Bill. If indeed the Statute prevented the filing of a Bill, the Courts would not have been so long and so constantly in the habit of making it one of the terms of the Rule of Court, that no Bill in Equity should be filed. It appears that if a Bill be filed, and an Attachment is sought for suing in Equity, the Court has a discretion, whether it will grant it, and will not grant it if the proceedings in Equity appear to the Court to be proper (s).

In a late case (t), where a Bill was filed to set aside an Award, it was holden that there is no Jurisdiction in Equity to stay by Injunction process *of a Court of Law upon an Award [*298 made a Rule of Court; and it has been recently held, that if Award is made a Rule of Court, this Court cannot act, the Jurisdiction being transferred to the Court in which the submission was made a Rule; but if the submission is not acted upon, no other Court acquires Jurisdiction—no process of contempt lies—and it is the same as if no such submission had been made (u).

When the submission to an Award is made a Rule of Court, the application to set it aside must be made within the next Term subsequent to the Award; and after the expiration of the Term, and when an Attachment is moved, for not performing the Award, the Court will permit a Party to show that the Award is illegal *on the face of it*, but no matter *extrinsic* to the Award can then be urged to resist a compliance with it (x). If Fraud in the Award were discovered after the expiration of the Term, would not a Court of Equity relieve?

When Parties of age, (for an Award does not bind an Infant) (y), have submitted to make the submission to the Award a Rule of Court, (and it is no part of the Rule that a Bill in

(p) Braddick v. Thompson, 8 East, 453.
347; Grimstone v. Bell, 4 Taunt. 254.

(q) 4 Taunt. 255.

(r) See Lord Lonsdale v. Littledale, 2 Ves. jun. 453.

(s) Burton v. Periam, mentioned in Lord Lonsdale v. Littledale, 2 Ves. jun.

(t) Gwinett v. Bannister, 14 Ves. 533.

(u) Stoff v. Andrews, 2 Madd. Rep. 10.

(x) Pedley v. Goddard, 7 T. R. 78. 1 East, 277, 11 East, 368.

(y) 1 Ch. Cas. 279.

Equity shall not be filed,) it is a contempt of Court to dispute the order, unless *partiality, corruption, or misbehaviour* in the Arbitrators can be shown: and this depends upon the denial in the Answer of the facts charged, and if that is sufficiently done, a plea of the Award will be sufficient (a); but still, if upon the *299] hearing of the Cause *the Evidence should be strong enough to convince the Court that the Arbitrators have been guilty of corruption, partiality, or misbehaviour, it will effectually open the plea (a).

Where an Award is impeached, on the ground of gross misconduct in the Arbitrators, and they have been made Parties to the Suit, the Court has ordered them to pay the *Costs* (b). And in such Case a Demurrer would not probably, be allowed, as it will in general where a Bill is filed to have the benefit of or to impeach an Award, and the Arbitrators are made Parties, for the Plaintiff can have no decree against them, nor can he read their Answer against the other Defendants (c).

Insurances fraudulently obtained may be set aside; as, where a Merchant had a doubtful Account of a Ship, and insured his ship, without acquainting the Insurers what danger the Ship was in, it was held to be a Fraud, and the Policy was ordered to be delivered up, with Costs, but the Premium to be paid back, and allowed out of the Costs (d).

So, a Policy of Insurance for insuring a Life, gained by fraud, has been set aside with Costs, both at Law and in Equity, and the Premium received on the Policy, directed to go in part of Costs (e).

A *Release*, or discharge obtained by fraud or compulsion, may be set aside; as where a Scrivener ran away with 2000*l.* *300] which he was intrusted to lend *out, and after some time writes to the Party that if he will take 500*l.* of his money and give him a discharge he should have it, which he did, not knowing how to come by his money; yet afterwards the Creditor was relieved in Chancery for the rest, notwithstanding his own release (d).

If a *Verdict* has been obtained by *fraud* a Court of Equity will give relief (e).

So if a *Judgment at Law* be obtained against conscience, a

(a) *Ld. Redesdale's Tr. Pl.* 209.

(a) *Lingood v. Croucher*, 2 *Atk.* 396, and *S. C.* p. 506.

(b) 2 *Atk.* 395, 412. 504. 2 *Ves.* 315, 317. *Cas. Temp. Finch*, 141.

(c) *Redesd. Tr. Pl.* 131.

(d) *De Costa v. Scandret*, 2 *P. Wms.* 170.

(e) *Whittingham v. Thornburgh*, 2

Vern. 206. *S. C. Prec. Ch.* 20.

(d) *Dr. Lake v. Deane*; for by Lord Egerton, *volenti non fit injuria, si dolo sit inductus ad consentiendum*. [*Gooding's Bank. Law*, 2d edit. 192, quot. 2 *Christian's B. L.* 156.]

(e) *Bateman v. Willos*, 1 *Sch. & Lefr.* p. 205.

Court of Equity will decree the Party to acknowledge satisfaction on that Judgment, though he has received nothing (f). (1)

A *Decree* obtained by fraud may be set aside, not by a rehearing, or appeal (g), but upon an original Bill in the nature of a Bill of Review (h). It is said, indeed, that a *Decree*, or interlocutory Order, obtained by fraud, may be set aside upon *Petition* (i); but this was probably meant to extend only to the case of a Decree not signed and enrolled, and where the fact of Fraud could not be controverted (k). An *Order in Lunacy* may be set aside by Bill if obtained by fraud (l).

When a Decree is sought to be impeached on the ground of Fraud, the proper defence seems to be, a *Plea of the [*301 Decree, accompanied by a denial of the Fraud charged (m).

So, if *Probate* be obtained of a Will procured by fraud, the Court will oblige the Party so obtaining Probate, to consent to a revocation of the same (n).

The Purchase of an Estate in the *West Indies* by a *Creditor* under his own Execution, and which, under the circumstances, appeared to be a sham Sale, and without competition, and contrived with a view to get the Estate at an under-value, has been set aside (o); (2) but unless Fraud is proved, a Judicial Sale, had under the Process and Judgment of a Court having a competent Jurisdiction, cannot be set aside (p).

So if *Dower* be fraudulently or partially assigned by the Sheriff, a Court of Equity will give relief (q).

Deeds procured from a *drunken Man*, will not, according to some decisions, be relieved against. *Lord Coke* observes in regard to inebriation, "Although he who is drunk, is for the time,

(f) *Barnsley v. Powell*, 1 Ves. 289. See dict. *Mitchell v. Harris*, 2 Ves. jun. 135.

(g) *Bradish against Gee*, Ambl. 229.

(h) *Mussell against Morgan*, 3 Bro. C. C. 74; and see *Richmond v. Taylor*, 1 P. Wms. 734. *Loyd v. Mansell*, 2 P. Wms. 73. *Barnsley v. Powell*, 1 Ves. 120.

(i) *Sheldon v. Fortescue*, Aland. 3 P. Wms. 111.

(k) *Redesd. Tr. Pl.* 73, n. (i) 3d Edit.

(l) *Ibid.*

(m) *Redesd. Tr. Pl.* 287, and cases there cited.

(n) *Barnsley and Powell*, 1 Ves. 290; but see 2 Vern. 8, 76. 2 Ch. Cas. 178. 1 P. Wms. 389. 2 P. Wms. 286. 1 Ves. jun. 411.

(o) *Lord Cranstown v. Johnston*, 3 Ves. 170; and S. C. 5 Ves. 277. and see *White v. Hall*, 12 Ves. 324.

(p) *White v. Hall*, 12 Ves. 321.

(q) *Hoby v. Hoby*, 1 Vern. 218. S. C. 2 Ch. Cas. 160. *Sneyd v. Sneyd*, 1 Atk. 442.

(1) A court of chancery will not grant relief against a judgment at law, except in cases of fraud or surprise, or in extraordinary cases, where manifest injustice has been done; nor where the party might have defended himself, but neglected it. *Wintrop v. Lane*, 3 Des. 310, 323, 324, 325. *Irby v. M'Cree*, 4 Des. 422.

(2) And thus, where a judgment and execution which had been fully satisfied, were kept on foot by the assignees of the judgment, for the purpose of speculating on the property of the debtor, and which was purchased by the assignees at the sheriff's sale, it was decreed, that the assignees should release all their title and interest, so acquired, to the owner of the land, and deliver up the possession, pay the rents and profit, and damages for waste committed, and all costs. *Troop v. Wood*, 4 Johns. Ch. Rep. 228.

non compos mentis, yet his drunkenness does not extenuate his act or offence, nor turn to his avail ; but it is a great offence in itself, and therefore aggravates his offence, and doth not derogate from the act which he did during that time ; and that as well in cases touching his life, his lands, his goods, or any other thing that concerns him (r).” And it was the doctrine of *Sir J. Je- *302] kyl* (s), that the *having been in drink is not any reason to relieve a Man against any deed or agreement gained from him, when in those circumstances, unless the Party was drawn into drink through the management or contrivance of him who gained the Deed. So, too, the opinion of Lord *Hardwicke* on this subject appears to have been, that the drunkenness of one of the parties was not sufficient to set aside an Agreement, unless some unfair advantage was taken ; and therefore in the case before him, the agreement being to settle disputes in a family, and reasonable, and no unfair advantage appearing to have been taken, he refused to set it aside, though the party complaining of it was drunk when he executed it (t).

Decisions, by such Lawyers, are as a Law to succeeding Judges, though the reasons for them may not be satisfactory. It may, however, be observed, that by the Scotch Law, Persons in a state of absolute *drunkenness*, and consequently deprived of the exercise of reason, cannot oblige themselves ; but a lesser degree of drunkenness, which only darkens reason, has not the effect of annulling a contract (u). The distinction, thus taken, seems reasonable ; for it never can be said that a Person *absolutely drunk*, to use the Scottish term, has that freedom of mind generally esteemed necessary to a deliberate consent to a contract ; the reasoning faculty is for a time deposed. At Law it has been held that upon *non est factum* the Defendant may give *303] in evidence that they made *him sign the Bond when he was so drunk that he did not know what he did (x). So, a Will made by a drunken Man is invalid (y). And will a Court of Equity be less indulgent to human frailty ? It seems to be a Fraud to make a contract with a Man who is so drunk as to be incapable of deliberation ; and if so, the contracts of such Persons would, one might think, be relievable in Equity. Cases of glaring injustice may easily be imagined (z).

Heineccius (a), *Puffendorf* (b), and *Pothier* (c), all agree in considering contracts, under such circumstances as invalid ; and the admirable Author of the *Treatise of Equity* thus expresses

(r) 4 Co. 125.

(s) *Johnson v. Medlicott*, 3 P. Wms. p. 130. n. a. and see *Cook v. Clayworth*, 18 Ves. 12.

(t) *Cory and Cory*, 1 Ves. p. 19 ; but Lord Eldon has observed, “ it is a very strong case.” *Stockley v. Stockley*, 18 Ves. 30, 31.

(u) *Ersk. Inst.* p. 447.

(x) *Cole v. Robbins*, Bull. N. P. 172. S. C. referred to in MS. in 1 Selw. Abridgment, 493. n. a.

(y) 2 Cox. 6, 23.

(z) See on this subject, post.

(a) B. 1 Ch. 14. s. 392.

(b) B. 1 Ch. 4. s. 8.

(c) *Traite des Obligations*, P. 1 Ch. 1. s. 1. art. 4.

himself: "Although drunkenness is a kind of insanity for the time, yet as it is of its own procuring it shall not turn to his avail, either to derogate from his act, or to lessen his punishment; but it is a great offence in itself, and this holds as well to his life, his lands, his goods, or any thing concerning him. However, Equity, as it seems, will relieve in this case, especially if it were caused by the fraud or contrivance of the other Party, and he is so excessively drunk that he is utterly deprived of the use of reason or understanding; for it can by no means be a serious and deliberate consent" (d): and in a recent Case (e) where the Plaintiff did not contribute to make the Defendant drunk, but entered into *an Agreement with him when [*304 drunk, and a Bill was filed for a specific performance, it was dismissed with Costs. (1)

Conveyances in fraud of the Law are relieved against; for as the Court acts to protect Individuals in cases of Fraud, so it will act to prevent a Fraud upon the Law itself.

A Devisee is bound to answer a charge by the Heir that the Devise was upon a secret Trust, or undertaking for a charitable purpose, contrary to the Statute of Mortmain (f).

It is not, however, considered as a Fraud on the Law to take out a Commission for the purpose of defeating an Execution (g), or after a Judgment obtained, and before Execution, to convey all the Party's effects by way of Mortgage (h). Even after a *fieri facias* the Debtor may assign a Legacy *bona fide* for a valuable consideration and without notice, and the Assignment will be good against the Creditor (i).

A Bond given for Silks purchased to sell again to raise Money, has been ordered to be delivered up upon payment of the Sum really raised, this being a method, under the mask of trading to lend Money at an extraordinary rate of Interest (k). So, a beneficial Lease granted at the same time with a loan of Money by Lessee to Lessor, has been set aside, as *giving to the [*305 lender a Profit on the Money lent beyond legal Interest (l). In

(d) 1 vol. Treatise of Equity, edited by Fonbl. p. 67. See also on this subject Cragg v. Holme, 18 Ves. 14.

(e) Spiers v. Higgons, Rolls, 22d Feb. 1814.

(f) 9 Geo. 2. c. 36. Strickland v. Aldridge, 9 Ves. 516. S. C. MS. Mucklestone v. Browne, 6 Ves. 53. S. C. MS. and see on this subject, Adlington and Cann, 3 Atk. 141, and Boson v. Stathan, 1 Cox, 16. and S. C. Eden's Rep. 1 vol. 509.

(g) Ex parte Edmonson, 7 Ves. 303.

(h) King v. Mariassal, 3 Atk. 192.

(i) Edgell v. Haywood, 3 Atk. 357.

(k) Barker against Vansommar, 1 Bro. C. C. 149.

(l) Browne v. Odea, 1 Sch. & Lefr. 115; and see Drew v. Power, ibid. p. 182. Molloy v. Irvin, ibid. 310. Gubbins v. Creed, 2 Sch. & Lefr. 218. and see Leekey v. O'Donnel, ib. 466, &c.

(1) In South Carolina, it has been held, that a person is not bound by a contract entered into, where he was in such a state of drunkenness as to be incapable of distinctly perceiving and assenting to it; but, in general, intoxication will not exonerate a man from his contracts. Wade v. Colbert, 9 Rep. Con. Ct. 27.

a subsequent Case (m) the Court said it would not extend the doctrine of Lease and Loan farther than it had already been carried; and held that a Lease at a fair Rent, Lessee paying two Years Rent in advance, secured by Lessor's Bond, and an Insurance on his Life, was not impeachable.

There has long been a struggle in Courts of Equity, with persons who have made it their endeavour to find out schemes to get exorbitant Interest, and evade the Statutes of Usury; and the Court, it seems, hath never laid down any general rule beyond which it will not go, lest other means of avoiding the Equity of the Court should be found out; they therefore always determine upon the particular circumstances of each case; and wherever they have found the least tincture of fraud in any of these oppressive bargains, relief hath always been given (n); but whenever it is necessary to have the assistance of a Court of Equity to set aside an usurious Contract, it must be upon the terms of paying what is fairly due with legal Interest (o).

Before the Statute, 37 Henry 8, c. 9, all Interest on Money lent was prohibited by the Canon Law, as it is now in the Roman Catholic countries. This gave rise to many shifts and devices to evade the law. One which was then most common was provided *306] vided *against by that Statute, but the prohibition being confined to that particular sort of transaction, Usurers were thereby put upon other contrivances; and experience taught the Legislature in more modern Statutes (o), not to particularize specific modes of Usury, because that only led to evasion, but to enact, generally, that no shift should enable a man to take more than the legal Interest upon a Loan. Therefore the only question in all these cases, is, what is the real substance of the transaction, not what is the colour and form (p).

A Bill may be filed to have a Bond delivered up, and the Principal being discharged, to have repaid what has been paid over and above legal Interest (q). It might be different if the Securities had been delivered up (r).

In the case of Money lost at Gaming, and paid, the Court, it seems, would not grant relief, the Plaintiff in Equity being *particeps criminis* (s).

Other instances where the Court has interfered to prevent acts in fraud of the Law may be mentioned; as where A. granted an Annuity of 300*l.* a year to *qualify* his Son to sit for a Borough, and after his Son was chosen he tore off the Seal; but the Grant was established, it being an imposition on the Pub-

(m) *Obrien v. Grierson*, 2 Ball & Bea. 332. c. 16.

(n) *Lawley v. Hooper*, 3 Atk. 279.

(o) *Scott v. Nesbit*, 2 Cox, 183; and 37. S. C. MS. S. C. 2 Bro. C. C. 641.

(p) See the last Stat. 12 Anne, St. 2,

(p) *Lowe v. Waller*, Dougl. 740.

(q) *Bosanquet and Dashwood*, For.

(r) *Ibid* 41.

(s) *Ibid*.

lic (t). So, where a Father sought by Bill a Re-conveyance from his Son of an Estate given to him as a qualification to enable him to sit in *Parliament, the purpose being answered; the Bill was dismissed with Costs (u). If the Party found his mistake, and repented of it before he had carried his intention into execution, and the Person did not go into Parliament, the determination would be different (x). So if a Father, a citizen, makes a voluntary Conveyance to a Child, to enable himself to swear he is not worth the Sum of 15,000*l.* so as to avoid being chosen Sheriff, the Child would be entitled to the Estate (y). But it seems a Conveyance of an Estate to qualify as a Game Keeper, can be recovered back (z); there were, however, circumstances of gross fraud in this case.

Conveyances made of Estates in Trust, in order to screen them from forfeitures for Treason or Felony have been set aside as against the Crown (a), though good as against the Party (b).

So if an Estate in Fee, or in Tail be given to A. but in case he commits Treason within such a term of Years, is limited over, this is a void clause, and will not prevent a forfeiture (c).

Frauds on Covenants are relieved against.

If, for instance, a Father covenant on his Daughter's *Marriage to leave her at his death a full and equal share [*308 of his Personal Estate with his Son, and afterwards transfers his Personal Estate in the Funds into his Son's name, who verbally promised to pay the Father the Dividends for his life, this will be set aside as a *Fraud on the Covenant* (d). Covenants of this nature are by no means censurable. They do not confine or restrict the Father's powers. He may alter the nature of his property from personal to real; or he may give scope to projects, or indulge in a free and unlimited expense; but he is not allowed to entertain more partial inclinations and dispositions towards one Child before another. If his partiality to one Child is greater than to another, and he determines to make a difference in favour of such Child, he must do it directly, absolutely, and by an unqualified gift, surrendering all his own right and

(t) Anon. MS.

(u) See what Lord Eldon says, in *Curtis and Perry*, 6 Ves. 747; and Lord Hardwicke in *Birch against Blagrove*, Ambl. 265, 6. I have heard the late Lord Kenyon approve of this doctrine.

(x) *Birch against Blagrove*, Ambl. 266. *Platamone v. Staple*, Coop. 250.

(y) *Birch against Blagrove*, Ambl. 265, 6.

(z) See *Bridgman v. Green*, 2 Ves. 627.

(a) *Young v. Peachy*, 2 Atk. 253. The case of *Fletcher v. Robinson*,

Prec. Ch. 250, contra, was overruled, in *Chaplin v. Chaplin*, 3 P. Wms. 233.

(b) *Duke of Bedford v. Coke*, 2 Ves. 117; and see on this subject *Cottingham v. Fletcher*, 2 Atk. 155, and the observations of Lord Eldon on that case, in *Muckleston v. Browne*, 6 Ves. 68.

(c) *Carte v. Carte*, 3 Atk. 180. S. C. Ambl. 32.

(d) *Jones v. Martin*, 6 Bro. P. C. 437; and 8th vol. p. 242, reversing a decree in *Exchequer*, 3 Anstr. 882. See a Note of the Chancellor's Argument in this case, in the House of Lords, 5 Ves. 266. n. 2.

interest. He must give out and out. He must not exercise his power by an act which is to take effect, not against his own Interest, but only at a time when his own Interest will cease (e).

If a Husband, on a separation from his Wife, covenants to leave her such a portion of the Personal Estate as she would be entitled to under the statute of Distributions, if he had died intestate, the Husband, it seems, might spend all his substance, but could not reserve to himself any part for his own benefit, *309] nor lay it out in Land (f); but if under such circumstances the Covenant be, that the Wife surviving shall be entitled to her Dower, and Thirds of all Real and Personal Estate, whereof the Husband shall die seised or possessed, it has been held this leaves the Wife in the same situation as if not living separate with regard to Dower and Thirds, and does not interfere with the Husband's power of testamentary disposition (g).

If *undue influence* be used to obtain a Deed, a Court of Equity will set it aside; as if a Parent abusing the authority over his Child, obtains from it a Conveyance (h).

An Act done from the fear of *displeasing* a Father or Mother is not that sort of fear which vitiates a Contract; but if a Person having another under his authority employs ill treatment, or menaces, to procure a Contract, the same would be void; but Lord Hardwicke was of opinion, that if a Son, Tenant in Tail, and a Father Tenant for Life, agree on something for the benefit of the younger Children, and afterwards the Son complains of paternal authority being exerted, *though there might be something of that sort*, yet if the Agreement be reasonable the Court will not set it aside (i).

*310] *In some of the Cases it is said that transactions of this sort between Parent and Child will be looked at with jealousy, and so that the Father shall not take an improper advantage of his Authority (k); but the complaint must always be made in time, and not after the Father is dead, and the Son has entered into an act by his Marriage, under which immediately the moment it is celebrated, persons unborn acquire a right (l). As where

(e) Jones and Martin, in House of Lords, 5 Ves. 268, in note; see also Fortescue v. Hannah, 19 Ves. 67.

(f) See what is said in Cochran v. Graham, 19 Ves. 66.

(g) Cochran v. Johnson, 19 Ves. 63.

(h) See Ivers v. Ivers, Dom. Proc. 1734, 5. Scrope v. Offley, Dom. Proc. 24th May 1735, noticed in Grounds and Rudiments of Law and Equity, p. 19; and see Green v. Green, 25 January 1710, Dom. Proc. noticed in Lord Harcourt's Tables as follows: "Bill brought by a Son to set aside an agreement with his Father for releasing his Inheritance (being a Trust Estate in

Tail) for an Annuity, because he was under the awe of his Father, dismissed, there being no fraud proved, and the Son having been extravagant; but without prejudice to his Heirs."

(i) Cory v. Cory, 1 Ves. 19; and see Kinchant against Kinchant, 1 Bro. C. C. 369; see also on this subject Pothier, Tom. 1 17; and Domat's Civ. L. 1st Vol. 243. Brown v. Carter, 5 Ves. 576, and Hawes v. Wyatt, 2 Cox 263, and S. C. 3 Bro. C. C. 156. Wycherley v. Wycherley, 2 Eden. 180.

(k) Young v. Peachy, 3 Atk. 254.

(l) Bower v. Carter, 5 Ves. 877. and see 1 Ves. 401. Cocking v. Pratt.

a Son, Tenant in Tail in Remainder, when just of Age, joined his Father, who was Tenant for Life, in a Recovery, for the purpose of raising 3,000*l.* for the Father, and re-settling the Estate, the Son taking back only an Estate for Life, with Remainder to his first and other Sons, &c. it was held, that whatever Equity he might have had against that Settlement was lost by his Marriage and acquiescence, till after the death of his Father (*m*).

If a Son, in plentiful circumstances, gives his Father a Bond to pay him an Annuity for his Life, and it is done freely and without coercion, it is good (*n*) ; but if a Father who is Tenant for Life draws in a Son who is Tenant in Tail to join in a Conveyance which will destroy his Remainder, the Court upon very slender evidence will relieve the Son (*o*).

Where a Father had advanced a Child in his Infancy, and upon his coming of Age took a Bond *from him to a [*311 greater amount than the sums advanced, the Bond was held to be obtained by parental influence, and it was not allowed to stand as a security, even for the sums advanced, but was set aside altogether (*p*).

If a Warrant of Attorney (*q*), or a Compromise, be obtained from a Man in jail, it will not, it seems, be good, unless he has proper advice and assistance (*r*), the presence of Counsel for instance (*s*).

Frauds on Powers are often the subject of Relief in Equity.

A Party, for instance, will not be allowed to execute a Power for his own benefit, which was intended for the benefit of others ; as where a Person having a Power of Appointment among Children, and thinking one of his Children was in a consumption, appointed in favour of that Child, with a view, as the Court supposed, to take the chance of getting the Money as Administrator of the Child, the Appointment was set aside (*t*). So, when a Parent having a Power to appoint the Estate to any of his Children exclusively of the others, appoints to one, upon a bargain made before-hand with that Child, that he shall pay a consideration for it, a Court of Equity will relieve against the Appointment ; and the same relief will be administered against a Purchaser *with* notice of the Fraud (*u*), or *without* notice of the *Fraud, if the Purchaser has not the legal Estate (*x*). But [*312 the Court will not act against a Title under a Power upon a mere suspicion that the power had been fraudulently exercised (*y*):

(*m*) *Browne v. Carter*, 5 Ves. 862.

193.

(*n*) *Blackborn v. Edgley*, 1 P. Wms. 607.

(*t*) See what is said in *Mac Queen v. Farquhar*, 11 Ves. 479.

(*o*) *Heron v. Heron*, 2 Atk. 161.

(*p*) *Carpenter v. Heriot*, 1 Eden, 328.

(*u*) *Sugden on Powers*, 330, and doctrine adopted in *Polmer v. Wheeler*, 2 Ball & Bea. 30.

(*q*) *Roy v. Duke of Beaufort*, 2 Atk. 193.

(*x*) *Daubeny v. Cockburn*, 1 Meriv. 633.

(*r*) *Hinton v. Hinton*, 2 Ves. sen. 65.

(*y*) See what is said in *Mac Queen v. Farquhar*, 11 Ves. 167.

(*s*) *Roy v. Duke of Beaufort*, 2 Atk.

as where there was a Purchase under the Execution of a Power of Appointment by a Father, subject to Estates for Life in him and his Wife, in favour of their Son ; all three joining and receiving the Money, the fair value, which is presumed to be received according to their Interests in the Estate, and the Purchaser not bound to see to the application, and the transaction appearing fair both upon the Instrument and the abstract, it was held that the Purchaser could not object to the Title on the ground of a fraudulent execution of the Power (z).

A Child giving a consideration for an Appointment in its favour is a fraud in the Appointer and the Appointee, both on the other objects of the Power, who might not have been excluded but for such Agreements, and also upon those who are entitled in default of Appointment; for *non constat*, the Father would have appointed at all if there had been no such Agreement; nor can a purchaser for a valuable consideration, without notice, under the appointment, maintain his purchase against the person entitled under the settlement in default of Appointment, who has the legal Estate in the Fund, the subject of the Appointment (a).

*313] Where a Party interested in the non-execution of a Power prevents a strict compliance with the circumstance required in the execution of the Power, there, if the person who has the power does any act that plainly evinces his intention to execute it, such act will in Equity be deemed a good execution of it (b). As where the Remainder-man gets the Deed containing the Power into his possession, and will not allow the Tenant for Life to see it, the Tenant for Life may execute Conveyances; and though he does not pursue the terms of the Power, yet Equity will relieve, even in favour of a volunteer; the Remainder-man not being allowed to take advantage of his own wrong (c).

So if a Wife having a Power is desirous of executing it, but is prevented by her Husband, Equity will relieve (d).

Though there be a power in a Settlement to raise a portion for a younger Child, at *such time as the Parent should direct*, the Parent cannot direct it to be raised at an early age, fourteen for instance; for this is against the nature of the Power. Such a Power only enables the Parent to raise it in his own Life, if it should be *necessary*. It would be proper so to do upon the Daughter's *Marriage*, or for several other purposes (e).

The Cases relative to *illusory Appointments* under Powers have

(z) Ibid. 11 Ves. 467.

(a) See *Daubeny v. Cockburn*, 1 Meriv. 626.

(b) Sugden on Powers, 302. Cruise's Digest, 4th vol. 376, 2d edit. 3 Ch. Cas. 67.

(c) Cruise's Digest, 4th vol. 376, 2d

edit. Gilb. Chan. 306.

(d) Sugden on Powers, 302. *Pigot v. Penrice*, Com. 240. Prec. Ch. 471, there cited.

(e) Lord Hinchinbroke against Seymour, 1 Bro. C. C. 395.

created much difficulty in the minds of Judges, and great contrariety of opinion. At *Law, if some share, *however* [*314 *small*, be allotted, the Appointment is effectual (*f*); but in Equity the doctrine is very different. There an illusory Appointment is considered as a *Fraud* (*g*); and it is there held, that if a Person has a Power of Appointment among Children, or other objects, in such shares, manner, and form, and at such times as he thinks fit, he must make a fair, substantial, reasonable, and not an illusory appointment; and *of this the Court will on a Bill, filed for that purpose, form its judgment* (*h*). This doctrine, reluctantly adhered to in conformity to Precedents, seems to have overturned the principle laid down in several other cases (*i*), where the Court, from the difficulty of determining what is an illusory Appointment, has surrendered all discretionary authority on the subject, and has said, in determining what is illusory, that it will go as far as it is bound by Authority, but no farther; or in other words, that where the sum appointed in any case is not so small in proportion to the whole sum to be appointed, as in former cases where the proportion given has been held to be illusory, the Appointment is valid.

A Person having a Power of Appointment among Children, the terms of the Power compelling him to give something to each Child, is a Trustee, and must execute the Trust reposed in him, pursuant to the *intent of the Trust; he cannot execute [*315 it so as to leave one of the children without provision, for that would be contrary to the intent of the Trust. It has been generally said, that such a Power is intrusted to a Parent because he is likely to know best the wants of his Family, as circumstances may arise which could not be foreseen when the Power was given, and to apportion the provision made for his children accordingly; and if he properly executes his discretionary Power according to existing circumstances, mere inequality, however gross, will not vitiate the Appointment. But when he acts from mere caprice or mistake, and places one of the Children in such a situation that the provision intended for him amounts to nothing, the reasoning fails on which so gross an inequality which renders the Appointment in his power merely illusory might have been supported, and the Appointment must be deemed bad (*k*).

If an Appointment be determined to be illusory, and therefore proper to be rectified, the Court it has been holden, cannot do

(*f*) *Vanderzee v. Aclom*, 4 Ves. 785.

(*g*) *Boyle v. Bishop of Peterborough*, 1 Ves. jun. 310.

(*h*) *Bax v. Whitbread*, 16 Ves. 22. S. C. MS. and see particularly *Vanderzee v. Aclom*, 4 Ves. 784, 5. *Butcher v. Butcher*, on appeal, 1 Ves. & Bea. 79, &c. *Coleman v. Seymour*, 1 Ves. 211;

and see *Prec. Ch.* 256, and *Cracker v. Parrot*, 1 Chan. Cas. 228.

(*i*) *Butcher v. Butcher*, 9 Ves. 333. *Moccata v. Lousada*, 12 Ves. 123, and *Dyke v. Sylvester*, *ibid.* 126.

(*k*) *Lysaught v. Royse*, 2 Sch. & Lefr. 154.

otherwise than by decreeing an *equal distribution* (l), and giving the property as in default of execution of the Power (m).

Where, upon the face of the Appointment, a sufficient reason has appeared why a nominal Sum is given, it has been held to be effective (n); and *Lord Albanley* was of opinion that as between Parent and Child a sufficient reason for giving such a sum might be proved (o).

If, where there is a Power of disposing among younger Children, in such shares and proportions as the Party should by Deed or Will appoint, a younger Son is provided for amply by a Fortune *aliunde*, by obtaining a lucrative situation, or the like, it may be a ground for an Appointment so unequal that it might be otherwise deemed illusory; but that cannot be considered as a provision which is a mere expectancy, depending on the will and pleasure of another; and an Appointment cannot be deemed good or bad according to the manner in which that pleasure may be afterwards exercised. If a Father supposed that provision would be made for one of his Sons by his Brother, which expectation might be finally disappointed, a very unequal appointment made under that expectation, however founded and however reasonable at the time, could not be supported (p).

If a Power of Appointment be in part defectively executed, the whole of the Fund will not be distributable as in default of Appointment; but so much of the Fund which is well appointed will stand, and the remainder divided as in default of Appointment (q).

It has long been settled that an Appointment cannot be made to a deceased Child (r).

*317] *After a partial execution by Baron and Feme of an original Power, a secondary Power to arise in default of the execution of the original Power cannot be executed (s).

If under a Power of appointment among Children, a substantial share is given to each Child, it may be by different Instruments, at different times (t). A Power, for instance, of appointing a Fee may be executed at several times—at one time to pass an Estate for Life, and the Fee at another (u). So Powers of

(l) *Gibson and Kinven*, 1 Vern. 67. last edition; and see *Spencer v. Spencer*, 5 Ves. 362.

(m) *Pocklington and Bayne*, 1 Bro. C. C. 450.

(n) *Bristowe and Ward*, 2 Ves. 336. *Long and Long*, 5 Ves. 448; and see *Kemp v. Kemp*, 5 Ves. 859. *Boyle v. Bishop of Peterborough*, 1 Ves. jun. 310. *Spencer and Spencer*, 5 Ves. 368.

(o) *Spencer and Spencer*, 5 Ves. 368.

(p) *Lysaught v. Royse*, 2 Sch. & Lefr. 154.

(q) *Bristow v. Warde*, 2 Ves. 350. *Wilson v. Pigott*, *ibid.* 357. *Routledge*

v. Dorril, *ibid.* 360, which last case is observed upon in *Leake v. Robinson*, 2 Meriv. 391.

(r) *Maddison v. Andrew*, 1 Ves. 57. *Butcher v. Butcher*, 1 Ves. & Bea. 91.

(s) *Simpson v. Paul*, 2 Eden's Rep. 37.

(t) See *Wilson v. Pigott*, 2 Ves. 254. *Simpson v. Paul*, 2 Eden's Rep. 37, and *Digge's case*, 1 Co. 173, there cited; see also *Doe v. Milbourne*, 2 Term Rep. 721.

(u) *Borcy v. Smith*, 1 Vern. 55; and see 2 T. R. 725. *Zouch v. Woolston*, 3 Burr. 1136. 1 Black. Rep. 281.

Revocation and Appointment may be executed at different times over different parts of the Estate that are subject to the Power (x).

Wherever a Power is given to appoint to and among several Persons, the Power is not well executed unless some part is allotted to each (y).

In some of the Cases it has been determined that where there is a Power to divide among Daughters in such proportions as the Wife should think fit, it must be equally, unless a good reason appeared (z); but that is not now the Rule of the Court. But, under words of that sort, if some very good reason does not appear for giving a very small sum to one, such a disposition will not be allowed (a). If, for instance, *the Person having the exe- [*318 cution of the Power has provided for one of the objects of it in some other way, that is sufficient, and the Appointment will not be considered as illusory (b).

If the words of the Power be, "then to be disposed of among her children, as she shall think proper," a series of Judges, from Lord Nottingham to the present time (c), have held that they amount to a gift to all the objects; and the exclusion of one is an undue execution (d). If the words of the Power are "to such of her children as she shall think proper," that would give a latitude to appoint to one only (e). So where the words are, "to one or more of his Children," or, "to any of his children (f)," or, "to and among all such Child or Children (g)," or, "among all or such of his Children (h)," or, "to such of my Children (i)," they have been held to show a manifest intention to give a Power to appoint to any one Child that should answer the description (k).

Powers of this description cannot be delegated (l).

A Power of appointing among Children will include Children by any Marriage (m).

***A Power to make a Jointure, if fraudulently exercised, [*319 will be relieved against. As where a Jointure is to be made in proportion to the Portion to be received, the transaction must be fair, bona fide, without Fraud and collusion, not a nominal**

(x) 4 Cruise's Digest, 245, and Digge's case, 1 Rep. 173.

(y) Menzie against Walker, For. 72. Vanderzee v. Aclom, 4 Ves. 784.

(z) Astry v. Astry, Prec. Ch. 256.

(a) Kemp v. Kemp, 5 Ves. 859; and see Gibson v. Kinven, 1 Vern. 67, and Maddison v. Andrew, 1 Ves. 59. Burrell v. Burrell, Amb. 660.

(b) Kemp v. Kemp, 5 Ves. 861. Bristow v. Warde, 2 Ves. jun. 336.

(c) See Gibson v. Kinven, 1 Vern. 66. Menzey v. Walker, For. 72. Maddison v. Andrew, 1 Ves. 57. Alexander v. Alexander, 2 Ves. 640.

(d) Kemp v. Kemp, 5 Ves. 856, 7.

(e) Thomas v. Thomas, 2 Vern. 513.

(f) Tomlinson v. Dighton, 1 P. Wms. 149.

(g) Wollen v. Tanner, 5 Ves. 218.

(h) Macey v. Shumer, 1 Atk. 389.

(i) Laife v. Saltingstone, in C. P. 1 Mod. 189, 2 Lev. 104, Carter 232.

(k) Kemp v. Kemp, 5 Ves. 857.

(l) Ingram v. Ingram, 2 Atk. 88, cited 1 Ves. 259, arg. and recognised in Hamilton v. Royse, 2 Sch. & Lefr. 330.

(m) Butcher v. Butcher, 1 Ves. & Bea. 91.

but a real Portion. It often happens a Man marries a Lady with a small Portion, and to warrant a Jointure, he or his friends advance Money to make up that a nominal Portion, afterwards taking it back; that is a Fraud. So if the Wife has the requisite Portion, and it is settled to her separate use, that is not allowable; but wherever the Portion of the Wife is stipulated to be applied in a proper and reasonable manner, in the usual way of settling for the benefit of the family, that will be considered as a Portion received (n).

A Jointure of a "*clear yearly Sum*," means clear at the time of making the Jointure, and not that it is to be so during its continuance (o). The term *clear* is adjudged to mean clear of encumbrances, and all other charges which by the course and usage of the country in which the Lands lie ought to be borne by the Tenant; but subject to the Land Tax and all other outgoings, which according to such course of the country ought to be borne by the Landlord (p).

The Books abound with a variety of Cases (q) which have been considered as a *fraud on the Custom of London*; but the Statute of 11 Geo. I. c. 18. s. 17, having enabled Freemen of London "to give, devise (r), will and dispose" of their Personal *320] Estates, "as *they shall think fit," such cases can now seldom, if ever, arise.

Fraud occasioned by *preventing the execution of Deeds* will be relieved against in Equity. As where a Recovery was prevented by a Person, with a view that the Estate should devolve upon another, with whom he was connected, Lord *Thurlow* considered it as against conscience that any one should hold a benefit which he derived through the fraud of another (s).

It has been doubted whether on the Sale of a Ship the want of an Indorsement upon the Certificate, as required by the Register Acts (t), though occasioned by fraud, can be remedied in Equity; so imperative are the words of the Acts (u); and in some recent cases it has been held that under such circumstances no relief can be given on the ground of Fraud or accident (x).

(n) See *Earl of Tyrconnel v. Duke of Ancaster*, 2 Ves. 501, 2.

(o) *Ibid.* 502.

(p) *Ibid.* 504, 5.

(q) See *Broers v. Fairbeard*, 2 Vern. 202. *Turner v. Jennings*, 2 Vern. 612. 685, and other cases.

(r) This is the only statute, I believe, where the word *devise* is exclusively applied to *personal* property.

(s) *Huguenin v. Baseley*, 14 Ves. 290.; see also 289; and see *Mestaer v. Gillespie*, 11 Ves. 638. *Devenish v. Baynes*, Prec. Ch. 5; and see *Ambl.* 67. Prec. Ch. 393.

(t) 26 Geo. 3. c. 60, and 34 Geo. 3 c. 68.

(u) See *Mestaer v. Gillespie*, 11 Ves. 621. S. C. MS. and see *Speldt v. Lechmere*, 13 Ves. 588. S. C. MS.

(x) *Thompson v. Leake*, 1 Madd. Rep. 39. When a Sale of a Ship at sea is made, it is prudent to prevent any fraud in the Vendor, by refusing to endorse the Certificate ten days after the arrival of the Ship, in addition to the Bill of sale to have a power of Attorney to sign an Endorsement on the Certificate; which power would not be revoked by the bankruptcy of the Vendor, subsequent to the execution of the power, but previous to the Endorsement. See *Dixon and others v. Ewart and others*, 3 Meriv. 322.

Where an Heir apparent (y), or Devisee, prevents a Testator from charging a Legacy, by telling him it was unnecessary to give himself that trouble, and *that it should be paid; such [*321 undertaking has been enforced in Equity (z); but if the promise has been made by a person not interested, or not solely interested, it would be different (a).

So, where a Father purchased Lands to him and his Heirs, and when he was on his death bed sent for his eldest Son, and told him, that these Lands were bought with his second Son's Money, and that he intended to give them to him, upon which the eldest Son promised that he should enjoy them accordingly, and the Father died; the *Lord Keeper Wright* and the Master of the Rolls held that the eldest Son took the Lands, there being no declaration of the Trust in Writing; but *Lord Couper* held it to be a Fraud, and that the second Son should enjoy the Lands (b).

With regard to *Fraudulent Devises*, it is observable, that before the Statute, 3 *Wil. & Mar.* c. 14, bond and other specialty Creditors, whose debts did not immediately affect the Lands of their Debtors, were liable to be defrauded, either by their Debtor devising his Lands, or by the alienation of the Heir before any Action could be brought against him; to obviate which frauds, the Statute declares all Wills and Testaments, Limitations, Dispositions, and Appointments of real Estates by Tenants in fee simple, *or having power to dispose by Will fraudulent [*322 and void, as against Creditors by bond or other specialities; and that such Creditors may maintain their Actions jointly against the Heir and Devisee; and that if the Heir alien before Action brought he shall be liable to the value of the Land, and that the Devisee shall be chargeable in the same manner as the Heir would have been if the Lands had descended. By these Provisions the Speciality Creditor is in some degree protected against the Fraud of his Debtor, or his Heir; but the statute having expressly excepted Devises for payment of Debts, or for raising Children's Portions, in Pursuance of any Agreement or Contract made before Marriage, bond and other speciality Creditors, whose demands do in their nature affect the Land, are still liable to be prejudiced by such right of their Debtor so to devise his real Estate; for if he devise, subject to the payment of debts, his simple contract Creditors will be entitled to be paid, *pari passu*, with such bond or other speciality

(y) See *Chamberlaine v. Chamberlaine*, 2 *Freem.* 34.

(z) *Mestaer v. Gillespie*, 11 *Ves.* 638. S. C. MS.; see also *Strickland v. Aldridge*, 9 *Ves.* 519. S. C. MS.; and see *Ruck v. Kennegal*, 1 *Ves.* 123. S. C. *Ambl.* 67. *Barrough v. Greenough*, 3 *Ves.* 152. *Sellack and Harris*, *Vin. Abr.*

tit. Contract and Agreement, (H.) *Cas.* 31. *Devenish v. Baynes*, *Proc. Ch.* 3 *Chamberlaine v. Agar*, 2 *Ves. & Bea.* 262.

(a) See *Whitton v. Russell*, 1 *Atk.* 449.

(b) 5 *Vin. Abr.* 521. *Gilb. Eq. Rep.* 4, 11. cited 3 *Wood. Lect.* 435.

Creditors (c); and, in such case, even Creditors whose demands are barred by the Statute of Limitations have been let in (d).

Before the Statute, if the Testator had devised his Estates for the payment of his Debts, *all* Creditors, whether by speciality or simple contract, were, *pari passu*, allowed to take the benefit *323] of the devise (e); *for as the Money in those cases never reached the hands of the Executors, no Action lay, and the Creditor was obliged to apply to a Court of Equity for Satisfaction, whereupon, Equity not being tied down to the Rule of Law, introduced a new method of administration; and seeing the Testator had made no distinction between the difference of Securities given for the payment of debts, the Court conceived that the Testator meant to do equal justice to all his Creditors (f); and the Statute was supposed to be an approbation of Equitable assets, and therefore, after that Statute, when a devise was made for payment of debts, *all* the Creditors, were, as before the Statute, allowed to avail themselves of the Devise, and share the Estate, *pari passu*, as equitable Assets (g).

If the Heir taking by Descent, or the Devisee, alienate the Estate to a *bona fide* Purchaser, they themselves remain personally responsible, but the purchasers are not liable (h).

As we shall have occasion more particularly to consider the important doctrine as to Assets in a future part of this Work, that subject will not be further considered here.

It is a maxim, that a Party, *enabling another to commit a fraud is answerable for the consequences* (i). As a corollary from this doctrine, it was the old notion of the Court, that a second *324] Mortgagee, who has Title Deeds, *without notice* of *any prior encumbrance, should be preferred (k); on the ground that, if the Mortgagee lends money, without taking the Title Deeds, he enables the Mortgagor to commit a fraud (l); but this position has in recent Cases been overruled; and the doctrine now is, that the mere circumstance of parting with the Title Deeds, unless there is Fraud, Concealment, or some such

(c) See Fonbl. Eq. 1 vol. 282, 3, in note, who cites *Woolstoncroft v. Long*, 1 Ch. Cas. 32. 3 Ch. Rep. 7. *Hixom v. Witham*, 1 Ch. Cas. 248. *Anon.* 2 Ch. Cas. 54. *Girling v. Lee*, 1 Vern. 63. *Child v. Stephens*, 1 Vern. 101. *Sawley v. Gower*, 2 Vern. 61. *Wilson v. Fielding*, 2 Vern. 763.

(d) See Fonbl. Eq. 1 vol. 283. in note, who cites *Goston v. Mill*, 2 Vern. 141.

(e) Vid. *Woolstoncroft v. Long*, Ch. Ca. 32. *Anon.* 2 Ch. Ca. 54.

(f) 1 Bro. C. C. 139, in n.

(g) See the able judgment in *Silk and Prime*, 1 Bro. C. C. 139, in note; S. C. 1 Dick. 384.

(h) *Matthews v. Jones*, 2 Anstr.

506.

(i) Vid. *Bacon's Max.* 17.

(k) Vid. *Mocatto v. Murgatroyd*, 1 P. Wms. 394. *Head v. Egerton*, 3 P. Wms. 281.

(l) Vid. what *Burnett, Just.* says in *Ryall v. Rowles*, 1 Ves. Sen. 360. 1 Atk. 168; and see what *Justice Buller* says in *Goodtitle v. Morgan*, 1 T. R. 762. Mr. *Justice Burnett's* able judgment in *Ryall v. Rowles*, 1 Atk. appears, on comparison with that *Judge's MS. notes*, in *Lincoln's Inn Library*, to be *verbatim* the same. *Atkin's note* of the Judgment was probably furnished by Mr. *Justice Burnett*.

purpose, or some concurrence in such purpose, or that gross negligence, which amounts to evidence of a fraudulent intention, is not of itself a sufficient ground to postpone the first Mortgagee (m).

If a Trustee permits Title Deeds to go out of his possession for the purpose of Fraud, and though intending to defraud one person, he defrauds another, relief may be obtained (n).

So, where a Mortgagee was present whilst the Mortgagor was in Treaty for his Son's Marriage, and *concealed* his Mortgage, the Court decreed the Son, the Wife, and the Issue, to hold the Land against the Mortgagee and his Heirs (o).

Notwithstanding the general doctrine in *Bexwell and Christie*, (p), it seems now settled, that if on a *Sale by auc- [*325 tion, a Vendor employs a person to bid for him up to a certain price, with a view to prevent a Sale under that price, this is not to be considered as fraudulent, nor can a Purchaser, on such account, refuse a specific performance of his Purchase (q). But if a person is employed, not merely with a view to prevent a Sale at an under-value, but *to take advantage of the eagerness of Bidders to screw up the price*, such conduct it seems is considered as fraudulent (r). In preceding cases it was held that where all the Bidders at an Auction, except a Purchaser, are merely puffers, the Sale is fraudulent against such Purchaser; but where there are any real bidders who bid against each other, the bidding of the Puffers would not render the Sale invalid (s).

It is a very old doctrine, that where a Deed is *destroyed or concealed* by the Defendant, relief may be obtained in Equity (t).

If a Will, by which a *Personal Legacy* is given, *be de- [*326 stroyed or concealed by the Executor, he may be cited in the Ecclesiastical Court; but in such Case a Court of Equity has a more effectual Jurisdiction, and a Party may there obtain a

(m) See *Peter v. Russell*, 2 Vern. 726. *Towle v. Rand*, 2 Bro. C. C. 650. *Plumb v. Fluit*, 2 Anstr. 432. and particularly *Evans v. Bicknell*, 6 Ves. 190; see also *Barnett v. Weston*, 12 Ves. 133.

(n) See *Evans and Bicknell*, 6 Ves. 174, and what is said in *Gifford v. Brooke*, 13 Ves. 132.

(o) *Berrisford v. Milward*, 2 Atk. 49. S. C. Barn. 49.

(p) *Cowp.* 395.

(q) *Bramley v. Alt.* 3 Ves. 620. *Connolly v. Parsons*, 3 Ves. 625. n. a. and see what is said in *Twining v. Morrice*, 2 Bro. C. C. 331. *Smith v. Clarke*, 12 Ves. 477. By the 23 Geo. 3, c. 17, s. 20, the Owner of Property put up to Sale is exempted from the duties imposed on Sales by the Act, where he, or some person by him authorized, buys in the property; which, as Mr. Fonblanque

observes, [1 vol. *Treatise of Equity*, 227, n. (x)] seems indirectly to have given a sanction to puffing.

(r) *Smith v. Clarke*, 12 Ves. 483. A demand for attending an Auction to puff the sale of goods has been considered as an unfair transaction, and the demand not sustainable. *Walker v. Gascoigne*, Dom. Proc. 6 March 1726, noticed in *Grounds and Rudiments of Law and Equity*, p. 89, and in Lord Harcourt's MS. Tables.

(s) *Howard and Castle*, 6 T. R. 642. *Walker v. Nightingale*, 4 Bro. P. C. 193, last edition. *Christie v. Attorney-General*, 6 Bro. P. C. 520, last edit.

(t) *Bates v. Heard*, Tot. 66. S. C. 1 Dick. 4. *Eyton v. Eyton*, 2 Vern. 380. S. C. Prec. Chan. 116; and 1 Bro. P. C. 151. 2 Vern. 561. 3 Atk. 359. 1 Ves. 387. Hob. 109.

Decree upon the head of *Spoliation and Suppression*, without being put to the difficulty of going to the Ecclesiastical Court (u).

Where a *Deed* or *Will* is suppressed by the Heir, the Party claiming under such Deed or Will has on evidence of the contents (x) been decreed to hold and enjoy, and the Heir or Suppressor of the Deed or Will, to convey (y). In one case, where no evidence of the contents of the Deed appears to have been adduced, an interested Person, who confessed he had burnt it, was, by an interlocutory Order (z), committed, until he consented to admit the Deed as stated in the Bill (a). In another case, where a Will was suppressed, and no exact evidence was adduced as to the contents, the Plaintiff, the Devisee, was decreed to hold and enjoy until the Defendant produced the Will, and further order (b).

In every Case, however, of this description, proof of the existence of the Deed appears to be fundamental to the Decree (c), and is usually mentioned in Decrees affording relief in such cases.

*§27] *Where a Devisee obtained a Decree to hold and enjoy against the Heir, who, it was supposed, had suppressed the Will, and pending the Suit a third person got an Assignment of a Mortgage made by the Testator, and then purchased the Equity of Redemption of the Heir, with notice of the Will, the Court would not admit the Purchaser to dispute the justice of the Decree, nor to try at Law whether the Will was cancelled by the Testator (d).

The Suppression of Deeds will, it seems, afford a strong ground for the intervention of a Court of Equity, to prevent the operation of a *Fine*, even in the case of a legal Estate, and clearly in the case of a Trust Estate (e).

If a Bond be destroyed by the Trustee, the *Cestui que Trust* may file a Bill of Discovery, and if the destruction of the Bond is admitted, that does away the necessity of *Profert* at Law, and Liberty will be given to the Plaintiff to bring an Action in the name of the Trustee, and further directions will be reserved till after the Trial (f).

If a Person gives a voluntary Bond, and afterwards procures

(u) *Tucker v. Phipps*, 3 Atk. 360.

(x) *Saltern against Melhuish*, Amb. 249.

(y) *Dalston v. Coatsworth*, 1 P. Wms. 731; and see *King and Lord Hunsdon v. countess Dowager of Arundel*. Hob. 109. S. C. mentioned 2 P. Wms. 748, and *Woodcroft v. Burton*, noticed in the first-mentioned Case.

(z) See 1 P. Wms. 732.

(a) *Sansom v. Rumsey*, 2 Vern. 561.

(b) *Hampden v. Hampden*, mentioned 1 P. Wms. 733. S. C. 1 Bro. P. C. 250.

(c) *Cowper v. Earl Cowper*, 2 P. Wms. 748, 749, 750. Such proof appeared in *Gartside v. Ratcliffe*, 1 Ch. Cas. 292. *Hunt v. Matthews*, 1 Vern. 408. *Wardour v. Beresford*. 1 Vern. 452, not rightly reported in the particular mentioned in *Cowper v. Lord Cowper*, 2 P. Wms. 749; and see *Eyton v. Eyton*, Pr. Ch. 116.

(d) *Finch v. Newham*, 2 Vern. 216.

(e) *Bowles v. Stewart*, 1 S. & Lefr. 225.

(f) *Seagrave v. Seagrave*, 13 Ves. 439.

and destroys it, a Bill will lie for a Discovery and payment of the Money (g).

Another species of Fraud is, where one has *notice* of an unregistered Conveyance in a *Register County*, in which case, it is considered as a *fraud* to obtain a *registered Convey- [*328
ance (h), and insist on the Statute (i); and in such case the Court will relieve (k). The Statute of Anne was only intended to protect Purchasers against secret Conveyances. It does not affect the question of notice. It leaves that as if the Statute had not been made (l). Notice to the Agent is, in these cases, considered as notice to the Principal (m). The notice may be proved by *parol* evidence; upon which, however, Lord Alvanley observes, "I regret that the Statute has been broken in upon by *parol* evidence, and am glad to find *Lord Hardwicke*, in *Hine v. Dodd* (n), says, nothing short of actual fraud will do" (o). If a Deed of Appointment of Lands in Middlesex be made in pursuance of a Power in a former Deed, it will be postponed to a Mortgage, subsequent to, but registered before, it (p).

Private Acts of Parliament have been relieved against, when obtained on fraudulent suggestions (q).

Cases of Fraud in respect to Agreements, will be *more [*329 conveniently considered when we come to treat of the specific performance of Agreements.

Another head of Fraud is that of *Frauds on Partnerships*; as, if one of the Partners unduly pledges the Partnership Firm in discharge of his individual Debt. This, a Court of Equity will not permit; for though one Partner is bound by the acts of his Co-partner in all acts that concern or properly belong to the joint Trade, and bind each other in transactions with every one who is not distinctly informed of any particular circumstances which may vary the case; yet on the other hand, if the transaction has no apparent relation to the Partnership, the presumption is then the other way, and the Partnership will not be bound by the acts of one of the Partners, without special circumstances (r).

A., an Attorney, prevailed on B. to become a Partner with

(g) *Atkins v. Farr*, 1 Atk. 287. S. C. more full 2 Eq. Abr. 247.

(h) *Bushell v. Bushell*, 1 Sch. and Lefr. 102. *Worseley and De Mattos*, 1 Burr. 474.

(i) 7 Anne, c. 20.

(k) *Forbes v. Denniston*, 2 Bro. P. C. 425. S. C. Lord Harcourt's MS. Tables. This is the leading case on the subject, and appears to have been very much considered. *Le Neve v. Le Neve*, 3 Atk. 646. S. C. Amb. 436, and 1 Ves. 67, &c. *Blades v. Blades*, 1 Eq. Abr. 358. S. C. 3 Atk. 654. *Beatriff v. Smith*, *ibid.* p. 357. *Cheval v. Nichols*, 1 Str. 664. S. C. 2 Eq. Abr. 63. *Hine*

v. Dodd, 2 Atk. 275. S. C. Barn. 258. *Wrightson and Hudson*, 2 Eq. Abr. 609.

Sheldon v. Cox, Amb. 624. *Morecock v. Dickens*, Amb. 678. *Bushell v. Bushell*, 1 Sch. & Lefr. p. 100.

(l) *Sheldon v. Cox*, 2 Eden, 228.

(m) *Le Neve v. Le Neve*, *ut sup.*

(n) 2 Atk. 275.

(o) *Jolland v. Stainbridge*, 3 Ves. 486.

(p) *Scraston v. Quincey*, 2 Ves. 413.

(q) 2 Black. Com. 346, and the cases mentioned in 5 Cruise's Digest, 31, &c.

(r) *Ex parte Agace*, 2 Cox, 316.

him, and *B.* paid a premium; but before fourteen Months had expired, sued out a Commission against *B.*, and thus dissolved the Partnership. This was held to be a fraud on *B.*, and *A.* was decreed to return part of the Premium which had been paid, and to deliver up a Bond given to secure the remainder, but an allowance was directed to be made in respect of the time the Partnership subsisted (*r*).

Frauds by Infants have been relieved against; as where a Woman, at the time of her Marriage, was indebted on two promissory Notes, and after the Marriage the Husband gave his Bond for the amount to the Creditor, who thereupon delivered up the Notes; and the Bond being put in Suit, the Husband [*330] pleaded *his Infancy at the time of giving the Bond.

On a Bill filed, the Court ordered the Notes to be returned to the Plaintiff, with directions that the Defendant should not plead the Statute of Limitations to the Action the Plaintiff should bring on the Notes, or any other Plea which the Defendant could not have pleaded at the time the Bond was given; but the Court would not order immediate payment of the money (*s*).

With respect to the form in which relief is given in cases of Deeds fraudulently obtained, the whole transaction, it seems, is undone, and the Parties are restored to their original situation (*t*).

Where a Release of a legal demand has been obtained by Fraud, though such Release will be set aside, yet the Court will not decree payment of the legal demand (*u*).

Where a Conveyance of an Estate has been obtained by Fraud, a Re-conveyance has, in several cases, been directed (*x*); but it seems unnecessary, and to have been done *ex abundanti cautela* (*y*). No part of a fraudulent Agreement can be supported except where some consideration has been given that cannot be restored: and it has consequently become impossible to rescind the transaction in *toto*, and to replace the parties in the same situation, as where Marriage is the consideration (*z*). [*331] If the Estate has been conveyed *to a third Person, as an Instrument, not privy to the Fraud, it would be different; and so if the Deed is set aside upon paying so much Money; there, till payment, the Estate remains in the Grantee (*a*).

In general, indeed, where Deeds are set aside for Fraud, they will be permitted to stand as a security for what is really due (*b*). (1)

(*r*) *Hamil v. Stokes*, 1 Daniel, 20.

(*s*) *Clarke v. Cobley*, 2 Cox, 178.

(*t*) *Daubeney v. Cockburn*, 1 Meriv. 644.

(*u*) *Pascoe v. Pascoe*, 2 Cox, 109.

(*x*) See *Barnesley v. Powell*, 1 Ves. 284.

(*y*) See *Bates v. Graves*, 2 Ves. jun. 294. *Hawes and Wyatt*, 3 Bro. C. C. 156, and the remarks on that case

in *Attorney-General and Vigor*, 8 Ves. 283.

(*z*) *Daubeney v. Cockburn*, 1 Meriv. 643.

(*a*) *Hawes and Wyatt*, 3 Bro. C. C.

156.

(*b*) See *Wharton v. May*, 5 Ves. 69.

Purcell v. Macnamara, 14 Ves 106.

Pickett v. Loggon, *ibid.* 244.

(1) Vide *Boyd v. Dunlop*, 1 Johns. Ch. Rep. 478.

CHAP. IV.

INFANTS.

His Majesty, as *Pater Patriæ*, is entitled to the care (c), (not the guardianship) (d), of Infants, and this care is delegated by the King to his Court of Chancery (e), and, as it seems, to that Court only, for the Court of King's Bench has not any of that delegated authority that belongs to the Chancellor (f); neither, it seems, has the Court of Exchequer. "That Court," says a learned Writer, "may appoint a Guardian *ad litem*; it may also, when the interest of an Infant comes before it, provide for its security; but whether it can appoint a Guardian to an Infant for general purposes where none is appointed, or whether it can, in an equal extent, exercise that protective power which watches over the Interest of Infants in *the Court of [*332 Chancery, is a point which I do not find any where solemnly determined" (g).

The Court of Chancery, therefore, it seems, has the exclusive care over Infants: and though by Act of Parliament the Court of Wards had a particular power over Infants and Lunatics, yet in every other respect the Law as to Infants continued as before; and when the Court of Wards and Liveries was dissolved by the 12 Car. 2. c. 24, the power of the Court over Infants resulted back to them again in its original extent (h).

The Court of Chancery, however, it must be observed, exercises in general no control over Infants, unless they are *Wards of Court*; filing a Bill on their behalf makes them Wards of Court (i).

The strongest instance, perhaps, in which the Court of Chancery has exercised its Jurisdiction in regard to Infants, is where it has taken from a Parent, the custody of its Child; but this has been done in many cases; for though, in general, a Father has a natural and legal right to such Custody (k), yet a Child has been removed from the control of a Father in *constant habits of drunkenness and blasphemy* (l); and so in case of *gross ill*

(c) Bract. Lib. 3. c. 9. Fleta, Ch. 2. Stamford Prær. 39.

(d) Eyre v. Countess of Shaftsbury, 2 P. Wms. 117.

(e) Berty v. Lord Falkland, 2 Vern. 333, 342. 2 P. Wms. 119; and see 2 Atk. 315. 3 Atk. 305. Butler v. Freeman, Ambl. 301. De Manneville and De Manneville, 10 Ves. 59.

(f) 2 P. Wms. 118.

(g) Treatise of Equity, by Fonbl. 2

vol. 229, in note.

(h) Hill v. Turner, 1 Atk. 516; and see Roach and Garvan, 2 Ves. 159.

(i) Ambl. 303. Lord Raymond's Case, For. 60. S. C. MS.

(k) Ex parte Hopkins, 3 P. Wms. 154.

(l) Vide Case mentioned in De Manneville v. De Manneville, 10 Ves. 61, 2.

treatment (m) ; and even where (a strong case) the Father had become *insolvent* (n). Acting under the same power of control, *333] *a *Father* has been prevented taking his Child *abroad* with an intention to educate him there (o) ; and even if it be suspected that the Child will be taken abroad, the Court will interfere (p), and oblige the Parent to give security that he will not remove it, or do any act towards, or for the purpose of removing it out of the Jurisdiction (q).

If a Child, a Ward of Court, would not be safe, the Chancellor would not permit it even to go to *Scotland* (r) ; nor will it, at the instance of a Guardian, make an order to take the Infant out of its Jurisdiction (s) ; and if taken out of the Jurisdiction, he will be ordered to bring him home (t).

As it is beside the plan of this Work to enter into the Common-Law doctrine as to Infants, (of which there is an abundance to be found in the Common-Law writers,) what is here said will be confined to the peculiar doctrine of the Court of Chancery on that subject ; and this, exclusive of the privilege of Infants, as allowed in the practice of the Court) principally respects, 1st, the *Guardianship*, 2dly, the *Maintenance*, and 3dly, the *Marriage*, of Infants.

1. By the Common Law, a Testator could not by any Testamentary Disposition affect either his Land or the Guardianship of his Children (u) ; nor does the Guardianship of Children appear to have been made the subject of Testamentary Disposition until the *12 Car. 2. c. 24 (x), which Statute was drawn by Lord Ch. J. Hale (y), and enables the Father (not the Mother) (z), to dispose of the Guardianship of the Child, until twenty-one, but not beyond that period (a) : and though a *Male* Infant marries, the Guardianship does not determine until twenty-one (b) ; but by the marriage of a *Female* Infant before that age, the Guardianship is determined (c).

It has been recently decided, upon the Statute, that a Father may by Will dispose of the Guardianship of Children born and to be born, including Children by a second Wife (d). It has been holden also, that a Testamentary appointment of a Guar-

(m) *Whitfield v. Hals*, 12 Ves. 492.

(n) *Wilcox v. Drake*, 2 Dick. 631.

(o) *Cruise v. Orby Hunter*, mentioned in *De Manneville and De Manneville*, 10 Ves. 65 and 63 ; and in *Ex parte Warner*, 4 Bro. 101 ; and in 1 P. Wms. 704, note 1.

(p) *Eyre v. Countess of Shrewsbury*, 2 P. Wms. 102.

(q) *De Manneville v. De Manneville*, 10 Ves. 52.

(r) *Ibid.* 56.

(s) *Mountstuart v. Mountstuart*, 6 Ves. 363.

(t) *Foster v. Denny*, 2 Cha. Ca. 237.

(u) See *Vaugh.* 178. 180.

(x) *Ex parte the Earl of Ilchester*, 7 Ves. 370.

(y) *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 125.

(z) *Ex parte Edwards*, 3 Atk. 519.

(a) *Ex parte Ludlow*, 2 P. Wms. 638.

(b) *Mendes v. Mendes*, 3 Atk. 625. S. C. 1 Ves. 90. *Roach v. Garvan*, 1 Ves. 160.

(c) *Ibid.*

(d) 7 Ves. p. 348.

dian is not revoked by a subsequent testamentary appointment, not executed according to the Statute, and not directly importing a Revocation (e).

Strictly speaking, a Father cannot appoint Testamentary Guardians to a *natural Child*; but where he names Persons in his Will as Guardians, the Court, *on Petition*, will appoint those Persons Guardians, and, as it has been held, without a reference to the Master (f). Where a married Woman was appointed Guardian, the Money of the Infant was ordered to be paid to her upon her separate receipts (g).

*A Testamentary Guardian, by Statute, has all the remedies at Law which a Father has (h), and his power is considered as a continuation of the paternal Authority (i); but still he is viewed as a *Trustee*, on whose misbehaviour, or giving occasion of suspicion, the Court of Chancery will interfere (k). And it has been holden, that a Testamentary Guardianship is not assignable (l), it being but a bare Power or Trust; and as it is but an authority coupled with an Interest, if one or more of several Guardians die, the authority survives (m), and will not pass to Executors or Administrators (n).

A Guardian appointed for a Child by a stranger, during the Life of the Parent, is ineffectual (o). "It cannot be conceived," says Lord King, "because another thinks fit to give a Legacy, though never so great, to my Daughters, therefore I am by that means to be deprived of a right, which naturally belongs to me, of being their Guardian" (p); but the Court will take care in such case that a Child is educated according to his expectations (q).

So a Grandfather has no power to appoint Guardians of his Grandson, it being a right vested in the Father; but any one can give his Estate on what conditions he pleases; and there are instances where *a Grandfather has given his Estate [*336 to a Grandchild, and appointed Guardians of his Estate and Person; and if the Father did not submit to the Will, the Court has made the Father's opposition work a forfeiture of his Son's Estate. If there is any Gift to the Father in the Will, and he

(e) *Ex parte Earl of Ilchester*, 7 Ves. 348.

(f) *Ward against St. Paul*, 2 Bro. C. C. 583. *Peckham v. Peckham*, 2 Cox, 46. *Sed vid. Elwes v. Const*, 10 Feb. 1818, where V. C. Leach held a reference was necessary to see if they were fit and proper persons.

(g) *Wallis v. Campbell*, 13 Ves. 517.

(h) *Butler against Freeman*, Amb. 302.

(i) *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 115.

(k) *Duke of Beaufort v. Berty*, 1 P.

Wms. 702.

(l) *Mellish and De Costa*, 2 Atk. 14. 2 Mod. 40. *Vaugh.* 180. 2 Ch. Rep. 237. *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 121.

(m) *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 103.

(n) 2 P. Wms. 121; and see *Vaugh.* 179, &c.

(o) *Powell v. Cleaver*, 2 Bro. C. C. 509. *Ex parte Warner*, 4 Bro. 101.

(p) *Ex parte Hopkins*, 3 P. Wms. 154.

(q) 2 Bro. C. C. 500. 4 Bro. 101.

submits to it, the Court directs and appoints a Guardian on his presumed submission (*r*); but if the Father, not knowing that he was making the Election, pays back the Money, the Court would not act (*s*).

If a *testamentary Guardian* refuses, as he may, to act, (for we have not followed the provisions of the Roman Law on this subject) (*t*), a *Petition*, (a Bill for the purpose is unnecessary,) may be presented to appoint another Guardian (*u*); but it has been said that where Guardians have *accepted* the Guardianship, if afterwards they will not act in the Trust, the Court will compel them, nor will the Court appoint others in their stead, unless under very particular circumstances (*x*).

Where there is no Guardian, an Infant may, by *Petition*, without suit, obtain an Order for the Appointment of a Person to act as Guardian (*y*), (even where the Father is living, if he be an improvident Person,) and also obtain a reference as to Maintenance (*z*); *but though such an Order has often been made (*a*), it has in some instances been prevented being fully carried into execution until a Bill has been filed; as where the Property is considerable, or it is necessary to take accounts in the Master's Office; or when Trustees in whom a discretionary power is vested are called on to allow a Maintenance (*b*). The Costs of the *Petition* will be allowed to the Guardian in his accounts (*c*).

A Guardian has, on *Petition*, been appointed to an Orphan Infant, without Property, to consent to her Marriage (*d*); the *Petition* being supported by the Affidavit of the Petitioner's Brother, that the Father died a Widower, and that the Deponent was the Brother and nearest Friend of the Infant, and that she was not entitled to any Property, real or personal, and was of the Age of Twenty.

In some cases a *Receiver* has also been appointed on *Petition* (*e*); but *Lord Hardwicke* thought that was going too far (*f*). The right to Guardianship will never be decided on petition, but only on a Bill. (*g*.)

(*r*) *Blake v. Leigh*, Ambl. 306, 7.

(*s*) *De Manneville v. De Manneville*, 19 Ves. 63, 4.

(*t*) Inst. 21 to 25.

(*u*) *O'Keefe v. Casey*, 1 Sch. & Lefr. 106. Ex parte Salter, 3 Bro. C. C. 500.

(*x*) *Spencer against Earl of Chesterfield*, Ambl. p. 140.

(*y*) Ex parte Birchell, 3 Atk. 813. Ex parte Salter, 3 Bro. C. C. 500. S. C. 2 Dick. 769, where the subject is much discussed by the Registrar. Ex parte Kent, ibid. p. 88. Mellish and Da Costa, 2 Atk. 14. Ex parte Whitfield, 2 Atk. 315. Lady Tenham v. Barrett, 2 Bro. P. C. 539.

(*z*) Ex parte Mountford, 15 Ves. 445.

(*a*) See the Cases mentioned by Mr. Dickens, in ex parte Salter. 2 Dick. 772.

(*b*) *Corbet v. Tottenham*, 1 Ball and Beatty, Irish Rep. p. 60.

(*c*) Ex parte Salter, 3 Bro. C. C. 500.

(*d*) In re Woolscombe, 1 Madd. Rep. 213.

(*e*) Ex parte Odell, mentioned 2 Atk. 515. Ex parte Poploe, mentioned 3 Bro. C. C. 501.

(*f*) Ex parte Whitfield, 2 Atk. 315.

(*g*) Ex parte Hopkins, 3 P. Wms. 152.

Where the Infant's Property is appointed, appoints a Guardian, where the Property* amount would not appoint without.

If the Ecclesiastical Court, *ex officio*, without a *Quo Warranto*, it seems, making in upon the Jurisdiction of Guardianship of Infants (i).

If any misbehaviour be is a matter of Trust, has, a over it (k), and will interfere application to change a Guardian it has been said, that if a Trust the Trust upon him, and a move him for misconduct, a

If a Testamentary Guardian be referred to the Master to Guardian (o). But it is not a Dissenter (p); nor is it a sufficient testamentary Guardianship from second Husband, and that shouder of the Real Estate, in case Issue (q).

A Testamentary Guardian of the Infant's Estate, real interest real (s), unless authorized by the manifestly for the Infant's advantage (u). Lands purchased by the sonal Estate, or the Rents and case of his death during Minority (x); and there seems good infant's Trustees could turn and Real Property, they would then the Law gives him of disposing teen, and might at their pleasure an Infant from providing for him.

In several cases, therefore,

(h) *Wheeler, Ex parte*, 16 Ves. 266.

(i) *Buck v. Draper*, 3 Atk. 631.

(k) *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 106.

(l) *Ibid.* 117.

(m) *Vid. Earl of Ilchester*, 7 Ves. 348. *Anon. MS.* 22d Dec. 1803.

(n) *O'Keefe v. Casey*, 1 Sch. & Lesl. 106.

(o) *Smith v. Bate*, 2 Dick. 631.

(p) *Corbet v. Tottenham*, 1 Ball. Bea. p. 61.

fant has been ordered by the Court to be laid out in the purchase of Land, though there was no authority in the Will for changing the nature of the Property; it being at the same time ordered that the Estate purchased should be conveyed in Trust for the Infant, *his Executors and Administrators*, until he should attain the age of twenty-one, and afterwards *for him and his Heirs* (z).

*340] *As a Trustee out of Court cannot change the nature of an Infant's Property, so the Court which is only a Trustee, will act as the Trustee out of Court is bound to do; and finding that a change will be for the benefit of the Infant, will so deal with it as not to affect the Powers of the Infant over his Property even during his Infancy, when he has power over one species of property, not over the other. It may be for the benefit of an Infant, in many cases, that Money should be laid out in Land, if he should live to become adult; but, if he does not, it is a great prejudice to him taking away his dominion, by the power of disposition he has over personal Property so long before he has it over real Estate. The Court, therefore, with reference to his situation even during infancy as to his powers over property, works the change, not to all intents and purposes, but with this qualification, that if he lives he may take it as Real Estate, but without prejudice to his right over it during Infancy, as personal Property (a). Where a charge is paid off, or a Mortgage redeemed with an Infant's personal property, it is ordered that it be considered as personal Estate for the benefit of the Infant (b).

When the Guardian of an Infant *Tenant in Tail* cuts down Timber, the Money it produces will be considered as the *personal Estate* of the Infant; but if the Infant has the *Fee*, it will be considered as *Real Estate* (c).

*341] *Money ordered to be laid out in Land for the benefit of an Infant, must be so laid out; nor can there be an election to have the Money, as there might, if the Infant was of age to elect (d).

If a Feme purchases a Church Lease to her and her Heirs for three Lives, and dies, leaving an Infant Daughter, and two of the Lives die, and the Infant's Guardian renews the Lease, this is a new acquisition, and goes to the Heirs on the part of the Father (e).

The Guardian is the proper judge at what school to place his Ward; and the Court will not indulge the Infant in being put with a private Tutor, or in changing his school; and if he should re-

(z) *Ashburton v. Ashburton*, 6 Ves. 6; and see *Sergeson v. Sealey*, 2 Atk. 413. In *Ex parte Bromfield*, 3 Bro. C. C. 516, the Lord Chancellor says, "I do not remember any such order (that the produce shall be considered as personal estate) made with respect to timber cut on the infant's estate."

(a) *Ex parte Phillips*, 19 Ves. 132, 3.

(b) *Sic dict.* *Ex parte Bromfield*, 3 Bro. C. C. 516.

(c) *Tullit v. Tullit*, Ambl. 370. *Mason v. Mason*, mentioned Ambl. 371.

(d) See dict. in *Rook and Warth*, 1 Ves. 461.

(e) *Mason v. Day*, Prec. Chan. 319; and see *Pierson v. Shore*, 1 Atk. 480.

tuse to go to school will compel him (*f*); but in the case of a *Female Ward*, above the age of puberty and marriage, some weight will be laid on the inclination of the Infant, as to with whom she should reside and be educated (*g*).

If Guardians disagree as to the management of their Ward, the Guardianship devolves on the Court (*h*); and where there were differences between Guardians as to the Education of the Ward, parol evidence was held to be admissible of the Intent of the Father. Indeed, in such cases, all sorts of Evidence, it has been said, are received, to govern the Court in its direction (*i*).

2dly. The doctrine of the Court relative to the *Maintenance* of Infants may next be considered.

**Sir Joseph Jekyl* was the first who ordered a refer- [*342
ence as to Maintenance, though no Bill was filed for that purpose; and this has since been frequently practised (*k*); but the more recent course of the Court seems to be, not to grant a Maintenance upon Petition only, except in very special cases; as, where there is a specific fund for Maintenance, or the property is very small; but as a general Rule, if the Infant has 100*l.* per Annum, a Bill should be filed (*l*). In those cases where Maintenance is directed without suit, *Costs* may also be ordered (*m*).

The Act of the 52 Geo. 3. c. 32, authorizes the Court of *Chancery*, or *Exchequer*, in any cause depending, or to be depending, to order Dividends or Stocks, &c. belonging to Infants, to be paid to Guardians or other Persons for Maintenance of the Infant or Infants, or for their use and benefit, according to the discretion of those Courts; and by the 52 Geo. 3. c. 158, the former Act is extended to cases where Infants are entitled to *South Sea*, *East India*, and all other stocks.

Maintenance will not in general be allowed for *time past* (*n*), though it may under particular circumstances (*o*); but interest is never allowed on arrears of *Maintenance, any more than [*343 upon the arrears of a Jointure (*p*).

(*f*) *Hall v. Hall*, 3 Atk. 721; and see *Anon.* 2 Ves. 374.

(*g*) *Anon.* 2 Ves. 375.

(*h*) *Storke v. Storke*, 3 P. Wms. 52.

(*i*) *Anon.* 2 Ves. 56.

(*k*) See *Ex parte Kent*, 3 Bro. C. C. 88, and *Ex parte Salter*, *ibid.* 500.

(*l*) *Ex parte Mountfort*, 15 Ves. p. 448. In this case it does not appear what was the annual produce of the Infant's property; probably, as an order for maintenance was there made on petition, the property was under 100*l.* per annum, otherwise what the *Ld. Chancellor* did was inconsistent with what he

said.

(*m*) *Ex parte Thomas*, Ambl. 146.

(*n*) *Hughes v. Hugues*, 1 Bro. C. C. 386. *Hill and Chapman*, 2 Bro. C. C. 231.

(*o*) *Maberley and Turton*, 14 Ves. 409, overruling *Andrews and Partington*, 3 Bro. 60. *S. C.* *Cox*, 223; but see the remark on that case by the Solicitor-General in *Hoste v. Pratt*, 3 Ves. 733; see also *Rainsford v. Freeman*, 1 Cox, 417. *Sisson v. Shaw*, 9 Ves. 288. *Reeves v. Brymer*, 6 Ves. 425. *Sherwood and Smith*, 6 Ves. 454.

(*p*) *Mellish and Mellish*, 14 Ves. 516, 517.

Where there is a *specific Legacy* of Stock, Dividends are due for Maintenance from the death of the Testator (*q*).

Where a Fund is given as a Bounty to a Child, the Father, *if of ability*, notwithstanding a provision for Maintenance in the *donation*, must maintain the Child (*r*) unless in cases where it is given to the Father (*s*). If the Testator has given Dividends to the Father for the Maintenance of the Children, it amounts to a Legacy of the Dividends to him, which he will be entitled to, though he has not spent half of it in the Children's Maintenance (*t*).

Where Legacies are given to a Child by a *Relation*, a Father is not only obliged to maintain the Child, and provide for him out of his own pocket, but he cannot apply the Legacy to set him out in the World, or place him as an apprentice or clerk (*u*). (1)

But whether an Infant shall have an allowance of Maintenance during the life of the Father, depends always upon the particular circumstances of the case (*x*). The question generally is, whether he is of *ability*. It is not necessary that he should be absolutely insolvent *in order to claim an allowance, but that he is not in sufficient circumstances to maintain his Child suitably to his expectations (*y*). In one case it was held, that a Father with 6,000*l.* a year was not of ability to maintain his six Infant Children! "It is very loose," said *Sir William Grant, M. R.* "to consider any particular income as enabling a Father to maintain his Children. To a Nobleman, 6,000*l.* a year would not be thought enough to exclude him from requiring some Maintenance out of his Children's fortunes. To a private Gentleman it may be otherwise" (*z*). In previous cases it was held, that a Parent must maintain his Child, unless totally incapable, or by having a numerous family of children he borders upon necessity. Where Maintenance is allowed, it is always paid to the Parent out of the Child's Estate; and there is no instance of its being deducted out of a Legacy left by a Father to the Child (*a*), or out of a *Debt* due from the Father, though insisted on by Creditors (*b*).

(*q*) *Barrington v. Tristram*, 6 Ves. 224.
349.

(*r*) *Hughes against Hughes*, 1 Bro. C. C. 386. *Munday against Earl Howe*, 4 Bro. C. C. 226; but see *Hosie v. Pratt*, 3 Ves. 730, where, maintenance being directed by the will, no inquiry was directed as to the ability of the father.

(*s*) 1 Bro. C. C. 388.

(*t*) *Andrews v. Partington*, 2 Cox,

(*u*) *Darley v. Darley*, 3 Atk. 399.

(*x*) *Jackson v. Jackson*, 1 Atk. 515.

(*y*) *Buckworth v. Buckworth*, 1 Cox, 80.

(*z*) *Jervois v. Silk*, Coop. 53.

(*a*) *Jeffreys v. Jeffreys*, 3 Atk. 123.

(*b*) *Ibid.* *Bank of England v. Morris*, there cited.

(1) A father is bound to maintain and educate his minor son, if he is of sufficient ability, although the son has a considerable estate in his own right: And the father must account for the rents and profits of his son's estate, without any allowance for maintenance. *Cruger v. Heyward*, 2 Des. 94.

A Mother, married to a second Husband, is not obliged to maintain the Children by the first (c); but is entitled to an allowance for Maintenance from the Interest of their fortunes (d).

Where a Man had Children by his first Wife, and on her death married a second, and by the Settlement the Children of that Marriage were expressly secured a Maintenance, it was held, after the second Wife's *death, that the Father was not [*345 bound to maintain a Child by the second Wife.

Maintenance will be allowed where the Principal and Interest of a Legacy to a Child is vested, though the Interest is directed to accumulate till the Legatee attains twenty-one (e).

So Maintenance will, if necessary, be allowed to Infants, where the chance of surviving is equal among all, and no other interest that upon any contingency would take effect, will be defeated (f), or, where the Devisee over consents (g); and this, though there be in the Will, under which the Infants claim the Maintenance, a direction for accumulation during minority. But where, in the event of the Infant's death under twenty-one, leaving Issue, the accumulated Property is to go to such Issue, Maintenance is not allowed (h). In those cases where the Infant has not the absolute Interest, Maintenance is not granted on Petition only, but on a *Bill filed* exclusively for that purpose (i).

Where, from proceedings on a Bill for an Account, the Court is satisfied that the Fund is clear, an Infant *Residuary* Legatee, in respect of the necessary delay on taking of the Accounts, may have an allowance for Maintenance in the mean time (k).

*When Trustees are directed by Will to apply so [*346 much Interest as may be necessary for maintaining, &c. the Court will, if the Infants have other Property, confine the Maintenance to what is actually necessary (l).

A Testator directed Maintenance for his Sons during Minority, and for his Daughter till twenty-one or Marriage; and gave her a Legacy in case she should attain twenty-one, payable, and to carry Interest from that time; yet, having married at

(c) Sed. Vid. 2 Ventr. 353.

(d) Billingsly against Critchet, 1 Bro. C. C. 268. S. P. Anon. 20th April, 1816.

(e) Stretch v. Watkins, Madd. Rep. 253; and see Fairman v. Green, 10 Ves. 48.

(f) See Greenwell v. Greenwell, 5 Ves. 194. Errington v. Chapman, 13 Ves. 25. Ex parte Kebble, 11 Ves. 604. Lomax v. Lomax, ibid. 48. Wells v. Pugh. MS.

(g) Fairman v. Green, 10 Ves. 48. If the Devisee over be an In-

fant, he cannot consent, and maintenance will not be allowed. [Anon. MS.]

(h) Errat and Barlow, 14 Ves. 202. Aynsworth v. Pratchett, 12 Ves. 321. Ex parte Kebble, 11 Ves. 604. Collis v. Blackburne, 9 Ves. 470.

(i) Fairman v. Green, 10 Ves. 45. Sed quære; for Ex parte Kebble, 11 Ves. 604, was on petition.

(k) Warter v. —, 13 Ves. 92. Jervoise v. Silk, Coop. 52.

(l) Rawlins v. Goldfrap, 5 Ves. 440.

eighteen, she was allowed Maintenance for the interval until twenty-one. (m)

The Interest of small Legacies (300l.) has been ordered to be paid to the Mother for Maintenance, upon her affidavit that the Father was abroad in very embarrassed circumstances (n).

The Court, it seems, always refers it generally to the Master, to consider of a proper allowance, and does not make a special reference (o); and a large allowance for Maintenance and Education will, under circumstances, be granted (p); as where a Guardian or Father are in distressed circumstances (q); and where a Mother (r) or younger Children are left destitute, a large allowance will be made to the eldest Son to enable him to maintain them (s).

*347] * It is a general rule, that a Trustee cannot, for the purpose of Maintenance, break in upon the Capital, though the Capital may be so small as not to leave a comfortable Maintenance and Education; and it is very rarely that the Court itself has broke in upon the Capital, for the mere purpose of maintenance (t).

Sdly. *The Marriages of Infant Wards of the Court of Chancery* may next be considered.

Where Infant Wards of the Court are upon a Treaty of Marriage, the consent of the Court ought to be obtained. When the Court is applied to, it generally makes a reference to the Master, to see whether the Settlement proposed is proper; if it is found to be improper, the Court will not give the Infant leave to marry (u).

In like manner, in the City, an Orphan Infant cannot marry without the License of the Court of Aldermen on pain of Commitment. The Husband is usually required to take out his Freedom of the City, and the Court refers it to the Common Sergeant to approve of a proper Settlement (x). And though it appears the Party had no notice of his Wife being a City Orphan, yet still he is punishable, for he is bound to inquire (y).

The Marriage of a Ward, without the consent of the Guardian, is a *ravishment of the Ward*, and severely punishable by the *Stat. of Westm. second, c. 35.* (z). Nor is there any thing a

(m) *Chambers v. Goldwin*, 11 Ves. 1. See on this subject *Butler v. Butler*, 2 Atk. 60. *Jeffreys v. Jeffreys*, 3 Atk. 123.

(n) *Walker v. Shore*, 15 Ves. 122.

(o) *Burnett v. Burnett*, 1 Bro. C. C. 179.

(p) *Ex parte Lord Petre*, 7 Ves. 403.

(q) *Roach v. Garvan*, 1 Ves. 160.

(r) *Heysham v. Heysham*, 1 Cox, 179.

(s) *Harvey v. Harvey*, 2 P. Wms.

24. *Lanoy v. Duke and Duchess of Athol*, 2 Atk. 447. *Petre v. Petre*, 3 Atk. 511.

(t) *Walker v. Wetherall*, 6 Ves. 474; and see *Anon. Mos.* 41.

(u) *Smith v. Smith*, 3 Atk. 305.

(x) See *Frederick v. Frederick*, 1 P. Wms. 710, &c.

(y) Vid. note D. to *Herbert's case*, 3 P. Wms. 118.

(z) 2 Inst. 440. 2 P. Wms. 110. *Fitz. Nat. Brev.* 329. 2d Edit.

Court of Equity *entertains greater jealousy of, nor shows [*348 more resentment against, than the unlawful Marriage of Infants (a). The Courts seem to have been fully impressed with the great truth, that no act in Life is of more importance to an Individual than Marriage; none, on which the happiness of its future Life so much depends. (1)

When an Infant is committed by the Court to the custody or care of any one, such Committee gives a recognizance that the Infant shall not marry without leave of the Court, which form is very rarely altered, and only under special circumstances: so that if the Infant marries, though without the privity, or knowledge, or neglect of the Committee, yet the Recognizance is, in strictness forfeited, whatever favour the Court upon application may think fit to show such committee, when he appears not to have been in fault (b). In *Dr. Davis's Case* (c) the Recognizance was on application moderated, viz. "That the Infant shall not marry, with the Committee's privity, without the Consent of the Court."

If an Infant Ward of Court be suspected of being about to make an improper Marriage, and there be an affidavit of such intended Marriage, the Chancellor will grant an Injunction generally to restrain all communication with the Infant, by Letter or otherwise (d). *Hearsay Evidence of declarations* will be attended to on such occasions (e).

Where an Infant Ward of the Court is suspected *of [*349 forming an improper Marriage, and the Mother, her Guardian, countenances it, the Court will appoint a Guardian in her room, and restrain her from giving her consent to the Marriage without leave of the Court, and that the Infant should not be married without leave of the Court, and the Infant will be restricted from receiving any Letters or Messages from her admirer (f).

All Persons, it seems, concerned in the contrivance of the Marriage of a Ward of Court, knowing it to be such, are punishable for the contempt (g).

If *Peeresses* are instrumental in the Marriage of a Ward of Court, without the leave of the Court, a *sequestration* will be issued against them for their contempt (h).

(a) 2 P. Wms. 111.

(b) See *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 102.

(c) 1 P. Wms. 693.

(d) *Pearce and Crutchfield*, 14 Ves. 206; and see *Lord Raymond's Case*. For. 58. S. C. MS. *Beard v. Travers*, 1 Ves. 313.

(e) *Beard v. Travers*, 1 Ves. 313.

(f) See *Lord Shipbrook v. Lord Hinchinbrook*, 2 Dick. 547, 8, and the case there mentioned; and see *Rorch and Garvan* 1 Dick. 88.

(g) *Moore v. Moore*, 2 Atk. 157.

(h) *Eyre and Countess of Shaftsbury*, 2 P. Wms. 112.

(1) Where a man married an infant under 12 years of age, and she immediately declared her ignorance of the nature and consequences of the marriage, and her dissent to it; on a bill filed by her next friend, the court ordered her to be placed under its protection, as a ward of the court, and prohibited all intercourse or correspondence with her, by the defendant, under pain of contempt. *Synner v. Roff*, 3 Johns. Ch. Rep. 49.

A *Barrister*, a principal contriver of the Marriage of a Ward who had a large fortune, was, for his offence, committed to the Fleet, prohibited from practising at the Bar, and struck out of the Commission as a Justice of the Peace (i).

If a Lady, a Ward of the Court, marries *after she is of age*, without the consent of the Court, there is no contempt in the Husband, nor can the Court oblige him to execute a Settlement, if the Husband does not seek its assistance to obtain her Property; but if the Lady be under age, it will be considered as a contempt, and the Court is enabled, by Imprisonment, to compel *350] the Husband to make a proper *Settlement (k). In a very aggravated case, where a Guardian married his Ward, who was of age, to his Son, who had no Property, it was held to be punishable by an *Information* (l).

Where a Marriage of a Ward of Court, without consent, takes place, on a Petition by the Guardian, all Parties concerned will be ordered to attend, and the Husband will be committed (but not to *close confinement*, though *Lord Hardwicke* made some orders to that effect) (m), and restrained from receiving his Wife's visits; and she, it seems, may be compelled to leave her Husband. After some time, the Husband may petition to be discharged, on executing a Settlement approved by the Master.

The personal attendance of a person running off with and marrying a Ward has been dispensed with, on offering to go before the Master, and make a Settlement (n); and in some cases he has been discharged on *undertaking* to make a Settlement (o); but this Lord Eldon refused to do (p). The common course of the Court is to have a reference to the Master, to see that a proper Settlement shall be made before the contempt can be cleared (q).

Marrying an Infant Ward of the Court is a contempt, though the Parties concerned in such Marriage had no notice that the Infant was a Ward of the Court (r); and a Marriage in *Scotland*, *351] though on *the day the Bill was filed, has been held to be a contempt (s).

And though a Marriage has been had with a Ward of Court, and some years elapse before it comes to the knowledge of the Court, yet it will not suffer time to affect the right of the Court

(i) Mr. Justice Mitchell's Case, 2 Atk. 173. S. C. mentioned Ambl. 304.

(k) Ball v. Coutts, 1 Ves. and Bea. p. 300.

(l) Goodhall v. Harris, 2 P. Wms. 560.

(m) See 8 Ves. 79.

(n) Green against Pritzler, Ambl. 602.

(o) Stackhole's case, 3 Ves. 89. Winch and James, 4 Ves. 387.

(p) Bathurst v. Murray, 8 Ves. 79.

(q) Stevens v. Savage, 1 Ves. jun. 154.

(r) Herbert's Case, 3 P. Wms. 116.

(s) Sallis v. Savignon, 6 Ves. 572.

The modes in which a marriage in Scotland may be effected, are fully considered in Dalrymple v. Dalrymple, decided, with his usual learning, eloquence, and judgment, by Sir William Scott, in the Consistorial Court of London, 16th July, 1811. See Dr. Dodsen's Report of this Case.

to interpose in respect of the contempt (*t*); but it will not punish the Party in such case, unless very strongly called upon so to do (*u*).

If the Father is of ability, and implicated in the procurement of the Marriage, the Court, it seems, will use its animadversion to obtain a proper provision from him.

In Settlements of the Property of Female Wards of Court, much will depend upon the Fortune of the Husband, and his conduct. If a Beggar marries the Woman for the sake of her Fortune, the Court will not permit him to touch that Fortune; but if the Husband be of equal rank and fortune with the Ward, and as considerable a Settlement is made by the one as by the other, attention will be paid to such circumstances (*x*). The usual Settlement seems to be, to settle one fifth of the Dividends and Interest of the Property upon the Husband, and the residue upon the Wife, for her sole and separate use during their joint Lives, with a clause to prevent *anticipation (*y*), and a [*352 power to the Wife to give another one-fifth to the Husband by Will; the residue, subject to a Provision for maintenance, to accumulate, and with the Principal to go to the Children at their ages of twenty-one or Marriage, or if only one Child, to that Child; and in the event of a second Marriage (*z*), a power to the Wife to charge, by way of Appointment, to each Child by the first Marriage (*a*). In case of no Children, the Husband surviving, the Limitation is, in default of appointment, to her next of Kin, exclusive of the Husband (*b*).

In a gross case on the part of the Husband, the Court refused even to pay his debts out of the accumulations (*c*).

Contriving a Marriage without a due publication of Banns, is a conspiracy at Common Law, exclusive of the *contempt*, for which, it has been said, a Party *may* and *ought* to be indicted (*d*); and where upon the Marriage of a Ward of the Court, the Husband had falsely sworn she was of age, though only fourteen, the Clergyman was ordered to attend, and was reprimanded, and the Husband was committed, and ordered to be indicted, which he was, and was convicted, and suffered the punishment of the Pillory and Imprisonment. On his Petition to be discharged *on executing a Settlement, the Chancellor would [*353 not approve a proposal giving him any further Interest than in

(*t*) *Bell v. Cotts*, 1 Ves. and Beames, 297.

(*u*) *Ibid.* 302.

(*x*) *Ibid.* 303.

(*y*) See *Chassaing v. Parsonage*, 5 Ves. 17.

(*z*) In one case on a second Marriage, the Wife was enabled to settle the Interest of a moiety of her for-

tune on the second husband. See 4 Ves. 286.

(*a*) See *Wells v. Price*, 5 Ves. 398.

(*b*) *Bathurst v. Murray*, 8 Ves. 74.

(*c*) *Chassaing v. Parsonage*, 5 Ves. 15.

(*d*) *Priestly v. Lamb*, 6 Ves. 421. *Schrieber v. Letward*, 2 Dick. 592, and the cases cited; and 2 P. Wms. 560.

case of his surviving his Wife, and no Children, and an Appointment in his favour by his Wife (e).

It has been determined, that a General Act of Pardon, though with an exception of contempts, extends to pardon contempts in marrying Infant Wards of a Court of Equity (f).

Agreements *before Marriage*, and in consideration of the Marriage, on behalf of Infants, by Parents and Guardians, or by the Infant alone (g), have, as to *Personal Estate*, been held binding on the Infants (h). Indeed, if a Parent or Guardian could not, in such cases, contract on behalf of a Female Infant, so as to bind the property, the Husband, as it is a personal thing, would be absolutely entitled to it immediately upon the Marriage (i). And though in cases of this kind, Parents or Guardians act *fraudulently* or *corruptly*, the Marriage Agreement is not therefore to be set aside, or the Children to be stripped, but the Father or Guardian will be decreed to make satisfaction, as will, also, the Husband, if a Party to the Fraud (k). It seems, *354] however, to be *settled, (after much contrariety of opinion,) that a Female Infant cannot be irrevocably bound by Articles entered into during Minority, as to her *Real Estate*, but may refuse to be bound, and abide by the Interest the Law casts upon her, which nothing but her own act, after the period of majority, can fetter or affect (l); such as by receiving Interest (m), or accepting a Jointure for a year and a half (n). Even a partial accession at twenty-one to a Settlement by a Female Infant would be considered as an Election to abide by the whole (o); and it is to be observed, that if a *Male Infant* marries an adult Female, who by settlement covenants that her Estate shall be settled to certain uses, he is bound by her Covenant (p). And if a Female Infant does not when of age choose to accede to the engagement on her Marriage, the conscience of her Husband is bound not to aid her in defeating it; and in Equity, as he would not be

(e) *Millet v. Rowse*, 7 Ves. 419, and vid. what is said of that case in *Ball v. Goutts*, 1 Ves. & Bea. p. 298.

(f) *Phipps v. Earl of Anglesea*, 1 P. Wms. 696.

(g) *Williams v. Chitty*, 3 Ves. 544; see on this subject *Slocombe* against *Glubb*, 2 Bro. C. C. 551.

(h) 3 Atk. 613. 2 P. Wms. 608. *Anslie v. Medlycott*, 9 Ves. 19; and see *Durnford and Lane*, 1 Bro. C. C. 106; but see what is said of that case in *Carruthers v. Carruthers*, 4 Bro. C. C. 510. *Cannell v. Buckle*, 2 P. Wms. 244. *Lacy v. Moore* 3 Bro. P. C. 514. *Price v. Seys*, Barn. 117. *Seamer v. Bingham*, 3 Atk. 56.

(i) 3 Atk. 613.

(k) *Harvey and Ashley*, 3 Atk. 611.

(l) *Clough v. Clough*, 5 Ves. 717. S. C. before Lord Thurlow, 4 Bro. C. C. 510, mentioned, 3 Wooddeson's Lect. 453, in note; and see what is said in *Durnford and Lane*, 1 Bro. C. C. 115; and what Lord Eldon says in *Milner v. Lord Harewood*, 18 Ves. 275, contra *Cannell v. Buckle*, 2 P. Wms. 243. and see Lord Hardwicke's observations on that case in *Harvey v. Ashley*, 3 Atk. 615.

(m) *Franklin v. Thornburgh*, 1 Vera. 132.

(n) *Harvey v. Ashley*, 3 Atk. 607, mentioned 2 Ves. 671; and see *Smith v. Low*, 1 Atk. 490.

(o) *Milner v. Lord Harewood*, 18 Ves. 277.

(p) *Slocombe v. Glubb*, 2 Bro. C. C. 548.

permitted to do so, her act during coverture, would not be effectual (q). If, for instance, the property of the Female Infant consisted of an Estate for Lives, she might, when of age, refuse to do any act; but the Husband being seised *jure uxoris*, would have a right to say, that if she would not settle according * [*355 to the Agreement, he would take the Rents; and as she could not renew without his consent, he would not give his consent; and if the Estate expired during the coverture she could not give his consent; and if the Estate expired during the coverture she could not complain (r).

A Female Infant may be barred of Dower at Law by a *Jointure*, not, however, in consequence of any agreement of hers, but by force of the Statute, 27 Hen. 8, c. 10. s. 6; and though the Act recites only five modes of limiting an Estate in Jointure, yet these are only mentioned as examples, and do not exclude any other Estate consistent with the intention of the Act (s).

So, also, in like manner, an Infant may be barred by an *Equitable Jointure*, provided the Jointure be *competent and certain* (t), —as certain as her *Dower*; but if not certain, if only to take place upon a remote contingency, it will not bind (u); in which it differs from a Settlement by an *adult* Female previously to her Marriage, as to whom, though the provision be inadequate or precarious, it will be a good equitable Jointure (x).

A Settlement to bind an Infant must be fair and *rea- [*356 sonable (y); but inequality between the Dower and the Jointure will not always invalidate a Settlement. If, for instance, a Female Infant marries a Gentleman of great Estate, the Dower is one third, and she has a Jointure made to her of one tenth of the value; yet as the Law intrusts Parents and Guardians, with the judgment for the Provision of Infants, she cannot set aside the Settlement (z).

The favour shown to Infants may be traced in a variety of cases, and particularly in the Practice of the Court, as will be seen hereafter.

(q) *Milner v. Lord Harewood*, 18 Ves. 275, 6.

(r) *Milner v. Lord Harewood*, 18 Ves. 276.

(s) *Duchess of Somerset's case*, Dyer 67 a. and 248 a. 4 Rep. 2 a.

(t) See *Drury v. Drury*, or *Earl of Bucks v. Drury*, by which name it is reported in 3 Bro. P. C. 492. *Wilmot*, 177, reversing Lord Northington's decree, which is reported 2 vol. Eden, 39. The opinions in the House of Lords are also reported, *ibid.* p.

(u) See *Carruthers v. Carruthers*, 4 Bro. C. C. 500. *Smith v. Smith*, 5 Ves.

189. *Clough v. Clough*, 5 Ves. 710. *Lecky v. Knox*, 1 Ball & Bea. 215. The essentials to a good jointure under the stat. 27, H. 8. are well stated and illustrated by cases in Cruise's Digest, 1 vol. 218, &c. edit. 2.

(x) *Carruthers v. Carruthers*, 4 Bro. C. C. 500. *Williams v. Chitty*, 3 Ves. 545. *Estcourt v. Estcourt*, 1 Cox, 20. *Simpson v. Gutteridge*, 1 Madd. Rep. 613.

(y) *Williams against Williams*, 1 Bro. C. C. 152.

(z) 3 Atk. 612; but see what is said 1 Bro. C. C. 112.

The Interest of an Infant will not be affected by the recital of a Deed made during Infancy (a).

If a Legacy is given for the benefit of an Infant in one way, and it cannot be so applied, it may be applied for his benefit in another way; as where the Legacy was given to put him into Orders, and he became a Lunatic, it was applied in his support (b).

It appears to have been formerly the Practice to petition the King to direct his Judges to take a Fine or Recovery from an Infant. This Petition the King referred to his Chancellor, for his Report as to the propriety of what was thus petitioned for; and if after argument before him he reported that the Petition was reasonable, the King granted a Privy Seal (c). But common Recoveries, and Fines suffered by Privy Seal, are now disused, and private Acts of Parliament are had recourse to instead (d).

*357] *By the 7th Ann. c. 19, Infant Trustees or Mortgagees are upon Petition (e) (it cannot be by Motion) (f), enabled to convey, under the direction of the Court of Chancery or Exchequer, the Estates they hold in Trust or Mortgage, to such person or persons as either of those Courts shall direct. This Act applies to Copyhold, as well as Freehold, Lands (g), and, the Act being general, to Lands in Ireland (h), and in the East (i) and West Indies (k).

Until the passing of this Act, if the Estate descended, or came to an Infant, the Mortgagor could not have his Estate again until such Infant attained twenty-one; but the Act extends only to plain and express Trusts, and not to such as are implied or constructive only (l); nor will an Infant, in general, be ordered to convey, without suit, if he has any duty to perform as such Trustee beyond the mere Conveyance (m), or if he has an Interest, or there be a doubt on the subject (n). But though the Act has been held not to extend to cases where there are Trusts to be performed requiring a discretion on the part of the Infant, in modern Practice the Rule is said (o) to be relaxed; and that if all the persons beneficially interested under the Trusts to be performed are adult, and free from disabilities, and petition the *358] Court for a Conveyance to their Nominee, the Court

(a) Milner v. Lord Harewood, 18 Ves. 274.

(b) Barton v. Cooke, 5 Ves. 463.

(c) Vid. Sir Humphry Mackworth's case, 1 Vern. 461, and Mr. Raithby's note.

(d) Hesketh v. Lee, 2 Saund. 96, a.

(e) Evelyn v. Foster, 8 Ves. 96.

(f) Ibid.

(g) Watkins on Copyholds, 63.

(h) Evelyn v. Foster, 8 Ves. 96.

(i) Ex parte Anderson, 5 Ves. 242,

and the Cases there mentioned.

(k) Ibid. 240. 2 Bro. C. C. 325. 2 Dick. 569.

(l) Goodwin v. Lister, 3 P. Wms. 387.

(m) Attorney-General v. Pomfret, 2 Cox, 221.

(n) Hawkins v. Obeen, 2 Ves. 559, &c. Tuffin ex parte, 3 Ves. & Bea. 150. Ex parte Sergison, 4 Ves. 147.

(o) 1 Preston on Abstracts, 320.

will treat the Infant as a Mortgagee or Trustee within the Act. The Infant, also, being not only Heir, but entitled as one of the next kin (*o*), or as Co-executor and Co-residuary Legatee (*p*), to a share of the Mortgage Money, has been held not to be such an Interest as prevents the application of the Statute.

If on a reference to the Master under this Statute, the Master reports that the Infant is not a Trustee, &c. within the Statute, no exception can be taken to his Report, but the party disapproving of the same must, by *Petition*, make his objections to the Report (*q*).

Where the Vendor of an Estate died before the Contract entered into by him for the Sale was completed, his Heir at Law, an Infant, was declared to be a Trustee within the Statute, and was directed to convey (*r*). (1) So also an Infant, the surviving Life in a Bishop's Lease, not beneficially interested, has been held to be an Infant Trustee within the Statute (*s*).

In one case, *Lord Hardwicke* admitted an Infant Trustee might levy a Fine under this Statute, but was doubtful whether he could suffer a Recovery without a Privy Seal (*t*); but in a subsequent case he held that *an infant to whom a Trust Estate is [*359 devised in Tail may be ordered to convey by recovery, pursuant to the Statute (*u*); and the Court of *Common Pleas* in such Cases dispenses with the usual Affidavit as to Infancy (*x*).

An Infant must convey though he is a Trustee for a Charity (*y*).

No Order will be made on an Infant to convey, where the Trust does not appear in writing, but in such case the *Cestui que Trust* must file a Bill (*a*).

An Infant Trustee is never ordered under this act to convey to another Trustee upon Trusts to be executed. That can only be effected by a Bill, praying to have a new Trustee appointed, and a Conveyance (*b*).

Upon a petition for an Infant Trustee to convey, under the Statute, the Order, it seems, should be upon the Infant to convey,

(*o*) *Ex parte Carter*, 2 Dick. 609.

(*p*) ——— v. *Handcock*, 17 Ves. 383. approved in *Tuffin ex parte*, 3 Ves. & Bea. 150; and see *ex parte Bellamy*, 2 Cox, 422.

(*q*) *Ex parte Burton*, 1 Dick. 395.

(*r*) *Smith v. Hibbard*, 2 Dick. 730.

(*s*) *Ex parte Hodgson*, 2 Dick. 737.

(*t*) *Ex parte Bowes*, 3 Atk. 164. That a fine may be levied see *ex parte Maire*, 3 Atk. 479.

(*u*) *Ex parte Johnson*, 3 Atk. 556; and see *ex parte Smith*, Amb. 624. *Lombe v. Lombe*, Barnes. 217.

(*x*) 1 *Preston on Abstracts*, 326.

(*y*) *Attorney-General v. Pomfret*, 2 Cox, 221.

(*a*) *Ex parte Vernon*, 2 P. Wms. 549.

(*b*) *Ex parte Anderson*, 5 Ves. 243; and see *Rigg and Sykes*, 1 Dick. 400.

(1) In a similar case, the court refused to compel the infant to enter into personal covenants, but only to release and convey to the purchaser all the title and interest of which the ancestor died seised: But the purchase money was ordered to be retained, subject to the further order of the court, to provide an indemnity to the purchaser, in case there should be a failure of title. *Ellison's case*, 5 Johns. Ch. Rep: 261.

the other party undertaking to pay such costs as shall appear to be reasonably incurred; the same to be taxed by the Master (c).

Where an Infant conveys as a Trustee within the Statute, not being so, he will not be bound by his Conveyance under such an Order; yet, if it is a case in which he would be bound to convey, when of age, his Conveyance being voidable only during his Infancy, and until avoided, passing the legal Estate, and no *360] one having a right to elect for him, whether it should *be void or not, he would, when he became adult, be placed in such a situation, that if he sought at Law to avoid his deed, a Court of Equity would prevent him (e).

By the Statute 29 Geo. 3, c. 31, Infants, although they are the beneficial Owners of Leases, are enabled to surrender them for the purpose of renewal.

CHAPTER V.

SPECIFIC PERFORMANCE OF AGREEMENTS.

THE Jurisdiction of the Chancellor to enforce the specific Performance of Agreements forms one of the great heads of his Jurisdiction in Equity; and in the opinion of Lord *Hardwicke*, "the most useful one (f)." By the *Common Law*, every Covenant and Agreement, where there was no proper Conveyance to transfer the Right of the thing itself, was personal, and being so, the party, if it were unperformed, could only recover damages. If, therefore, a man covenanted to settle his Lands upon Marriage, or to convey them for a valuable consideration, the Covenantee or Vendee could only recover damages at Law for the breach of such Covenant or Agreement, but had no remedy there for the settlement of the thing itself. This was thought much less than complete Justice, because the party who had entered into the Covenant or Agreement was in conscience bound, not *361] only to make compensation for the breach, where *he could not perform it, but also actually to perform it, where it was in his power, and on this ground a Court of Equity interposed (g).

A. agreed to execute a Lease of Premises to *B.*, *B.* was let into Possession, and accepted a Bill for the money to be paid in pursuance of the Agreement. It was held, that it was no defence to an Action on the Bill by *A.* against *B.* that the former

(c) *Ex parte Cant*, 10 Ves. 554.

(e) ——— v. *Hancock*, 17 Ves. 384.

(f) *Penn v. Lord Baltimore*, 1 Ves. 446.

(g) See on this subject *Alley v. Es-*

champs, 13 Ves. 228. *Redesd. Tr. Pl.* p. 108, 1st vol. *Sch. & Lefr.* 120. *Lex. Prætoria*, MS. *Wiseman v. Roper*, 1 Chan. Rep. 84. 160. 1 Ves. 406; and see *Ibid.* p. 84.

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refused to execute the Lease ; his remedy being on the Agreement (h).

The earliest trace of the Equitable Jurisdiction of the Court of Chancery in *decreeing Agreements*, is supposed to be in a Case stated in the Year Book of 8 Ed. 4. 4 b, where it is said by *Justice Genney*, "that if I promise to build you a house, and do not perform my promise, you have your *subp na* (i) And *Finsur*, Chief Justice, in the 21 Hen. 7, speaking upon the different remedies given in the Courts, on the non-performance of contracts, observes, "that if a man bargain with another that he shall have his land for 10l. and that he will make him an estate therein by such a day, and he do not make the estate, an action upon the case lies ; but it is to be observed in that, he shall only recover damages ; but by subpoena the Chancellor may compel him to execute the estate, or imprison him."

At whatever time the Jurisdiction began, it is now very clear, that if a contract has been entered into by *competent Parties, and is, in the nature and circumstances of it, unobjectionable, it is as much of course in a Court of Equity to decree a specific performance as it is to give damages at Law (k). The Court, it is said, has a discretion in such cases (l), and so it has ; but it is not an arbitrary and capricious, but a regulated and judicial, discretion (m) ; (l) and governed by established rules of Equity (n).

It has been said (o), and generally speaking, correctly (p), that in cases of Agreements, before Lord Somers's time, the Party was sent to Law, and if he recovered any thing by way of damages, the Court of Chancery entertained the Suit ; but there must have been exceptions to this Rule, for there are cases where the Party may be relieved in Equity, though no action is sustainable at Law (q). If, for instance, an Agreement be made for the Sale of an Estate, and the vendor dies before the period when the Estate is to be conveyed, the Heir is bound to convey though no Action lies. So, upon an Agreement to assign a chose in action Equity will relieve, though no damages at Law would be given for the breach of the agreement. It will relieve also when the Action at Law has been lost by the default of the party seeking a specific performance, if it be notwithstanding *conscien-[*363

(h) *Moggridge v. Jones*, 14 East, 480.

(i) *Sed quæ*. if such an agreement would now be enforced in Equity, see post.

(k) *Hall v. Warren*, 9 Ves. 608.

(l) See 1 Ves. 279, and 1 Ves. & Bea. 527.

(m) *White v. Damon*, 7 Ves. 35 ; and see *Buckle v. Mitchell*, 18 Ves. 111.

(n) *Goring v. Nash*, 3 Atk. 186. *Revell v. Hussey*, 2 Ball & Bea. 288.

(o) *Dodsley v. Kinnersley*, Ambl. 406 ; and see *Harnett v. Yielding*, 2 Sch. & Lefr. 549. 553. *Select Cases in Chan.* 67 69.

(p) *Marquis of Norland v. Duke of Devonshire*, 2 Freem. 216. 1 Vern. 159.

(q) See 2 Freem. 246. *Williams v. Steward*, 3 Meriv. 486.

(1) Vide *St. John v. Benedict*, 6 Johns. Ch. Rep. 111. *Seymour v. Delaney*, 6 Johns. Ch. Rep. 222.

tious that the Agreement should be performed, as in cases where the terms of the Agreement have not been strictly performed on the part of the person seeking the specific performance. To sustain an Action at Law, performance must be averred according to the very terms of the Contract (*r*). There are other cases of the kind which might be mentioned (*s*); the proposition, therefore, of Lord *Raymond* (*t*), that a specific performance shall never be compelled for the not doing of which the Law would not give damages, seems too broadly laid down.

The effect of a mere Contract for the Purchase of Land is in many respects very different at Law, from what it is in Equity. At Law, the Estate remains in the Vendor, and the Money in the Vendee (*u*). It is not so in Equity; there, in general, it is a Rule, that what is contracted to be done for a valuable consideration is considered as done (*x*), and nearly all the consequences follow as if a Conveyance had been made at the time to the Vendee (*y*). The Vendor of the Estate, whether it be Freehold or Copyhold (*z*), is from the time of his Contract considered only as a Trustee for the Purchaser, and the Vendee is, as to the *364] Purchase Money, considered as a Trustee for the *Vendor (*a*). The Estate, provided a good Title can be made (*b*), is considered as the real Property of the Vendee; and vendible, chargeable, and deviseable (*c*), by him, even under general and sweeping words in a Will (*d*); and it would descend to his Heir, and may be assests (*e*). Nor is a Devise revoked by subsequently taking the Legal Estate, unless the nature of the Conveyance be such as shows an object beyond the mere completion of the contract, by taking the legal Estate (*f*).

A binding and valid Contract for the Sale of Lands which

(*r*) See *Davis v. Hone*, 2 Sch. & Lefr. 348. *Lannon v. Napper*, *Ibid.* 684, in Appendix.

(*s*) See *Wiseman v. Roper*, 1 Ch. Rep. 158. *Cary*, 84. Attorney-General *v. Day*, 1 Ves. 222. *Whitmill v. Farrell*, *ibid.* 258.

(*t*) Dr. *Bettesworth* and *Dean* and Chapter of *St. Paul's*, Select Cas. in Chan. 68.

(*u*) *Seton v. Slade*, 7 Ves. 274; and see the Reasons in *Cave* and *Holford*, 7 Bro. P. C. 602.

(*x*) See *Frederick v. Frederick*, 1 P. Wms. 713. *Lechmere* and *Earl of Carlisle*, 3 P. Wms. 215. *Bash v. Dalway*, 3 Atk. 533.

(*y*) Attorney-General and *Day*, 1 Ves. 220; and see 3 Atk. 687.

(*z*) *Hinton v. Hinton*, 2 Ves. 632. S. C. Amb. 277.

(*a*) *Green v. Smith*, 1 Atk. 573. *Polexsen v. Moore*, 3 Atk. 273. Some doubt appears to have been entertained

whether a Copyhold contracted to be sold could be devised before it is conveyed or surrendered to a Purchaser. See *Ardesoif v. Bennet*, 2 Dick. 413; but it seems it may; see *Sugd. Vend. and Purch.* 157.

(*b*) See *Polexsen v. Moore*, 3 Atk. 273; and see *Brome and Monk*, 10 Ves. 597. *Buckmaster v. Harrop*, 11 Ves. 607; and 13 Ves. 341. *Cave v. Cave*, 2 Eden, 143.

(*c*) *Seton and Slade*, 7 Ves. 274; and see *Davis v. Beardsham*, 1 Chan. Cas. 39. *Davis's Case*, 3 Salk. 85. *Browne v. Monk*, 10 Ves. 611, 614. *Ross v. Cunningham*, 11 Ves. 544, 5. 1 Ch. Cas. 93.

(*d*) *Potter v. Potter*, 1 Ves. 437. *Gibson v. Lord Mountford*, 1 Ves. 494.

(*e*) *Paine v. Meller*, 6 Ves. 352.

(*f*) *Rawlins v. Burgess*, 2 Ves. & Bea. 388.

the Vendor had previously devised by his Will, is, in Equity, as much a Revocation as a Conveyance would be at Law (g); and it may be doubted whether an abandonment of the Contract for Sale would set up the Will again without a Re-publication (h). Judgments obtained against the Vendor subsequent to the date of the Contract, and before the Conveyance, will not affect the Estate, if the purchase-money be paid, and the consideration is adequate (i); but all Judgments obtained against the Vendor subsequent to the *date of the Contract, and prior to the [*365 completion of the Purchase, are, in Practice, considered as liens, of which it is incumbent on the Vendor to procure a discharge by release or satisfaction for the security of the Purchaser, so far as any part of the purchase-money may remain unpaid after the Judgment, and notice thereof (k).

Money, articulated or directed to be laid out in Land, is considered as Land, and has all the incidents of a Real Estate (l). (1) It is no longer considered as personal Assets (m). A Husband may be Tenant by the Curtesy of it (n), though (a singular decision, constantly adhered to, but never approved) (o) a Wife cannot claim Dower out of it (p). It passes as Land by Will (q), though after the Will a Conveyance of the Estate be made to the Purchaser (r); and will not go as Money under a general Bequest to a Legatee (s). If the Testator has described the Money, as *so much Money agreed to be laid out in Land, [*366 it may pass under the Will as Personal Estate, and by a Will not attested by three Witnesses; but without such a particular interposition of the Testator, manifesting his intention, it remains, it seems, as Land, and belongs to the Devisee or Repre-

(g) *Bennett v. Earl of Tankerville*, 19 Ves. 178.

(h) *Ibid.* 179.

(i) *Finch v. Earl of Winchelsea*, 1 P. Wms. 277.

(k) *Preston*, on Abstracts, 3d vol. 329.

(l) See what Sir Thomas Sewell says in *Fletcher v. Ashburner*, 1 Bro. C. C. 497.

(m) *Earl of Pembroke v. Bowden*, 3 Ch. Rep. 115. S. C. 2 Vern. 52. *Lechmere v. Earl of Carlisle*, 3 P. Wms. 217.

(n) *Sweetapple v. Bindon*, 2 Vern. 536. *Otway v. Hudson*, 2 Vern. 583. *Chaplin v. Chaplin*, 3 P. Wms. 232. *Allen v. Allen*, Mos. 123.

(o) See 3 P. Wms. 234.

(p) *Crabtree v. Bramble*, 3 Atk. 687.

The reason why there may be a Tenancy by the Curtesy, though no right to Dower, is explained in *D'Arcy v. Blake*, 2 Sch. & Lefr. 388, 389. The Rule of Courts of Equity, so far as it excludes a Widow from Dower of an Equitable Estate against an Heir or Volunteer, goes, perhaps, beyond the reason of the Rule, but the decisions are so old, so strong, and so numerous, as to be unalterable by the Courts. [See *Ibid.* p. 391.]

(q) *Green v. Smith*, 1 Atk. 573. *Lingen v. Sowray*, Eq. Cas. Abr. 175, confirmed 3 P. Wms. 221. *Broom v. Monk*, 10 Ves. 611. *Rose v. Cunyngnam*, 11 Ves. 554, 5.

(r) *Broom v. Monk*, 10 Ves. 597.

(s) *Lechmere v. Earl of Carlisle*, 3 P. Wms 221, in note.

(1) So, likewise, it has been held, that where land has been directed, in wills and other instruments, to be sold and converted into money, it shall be considered as money or personal estate. *Craig v. Leslie*, 3 Wheat. 563.

sentative of the Real, not of the Personal Estate (*t*). If a Testator has blended his real with his personal fund, and has made a residuary Legatee, he will take all that is not disposed of (*u*).

A. made a Lease to *B.* for seven years, and on the Lease was endorsed an Agreement, that if *B.* shall, within a limited time, be minded to purchase the Inheritance of the Premises for 3,000*l.* *A.* would convey them to him for that sum. *B.* assigned to *C.* the Lease, and the benefit of this Agreement; *A.* dies; and by Will gives all his Real Estate (generally) to *D.* and all his Personal Estate to *E.* and *D.* equally. Within the limited time, but after the death of *A.*, *C.* claims the benefit of the Agreement from *D.* who accordingly conveys the premises to *C.* for 3,000*l.* This sum of 3,000*l.*, when paid, was held to be part of the Personal Estate of *A.*; and *E.* entitled to one Moiety of it, as such (*x*).

It has, however, been held, that though Money, in many cases, is considered as Land, when bound by Articles in order to a purchase, yet, that whilst it remains still Money, and no purchase is made, the same is to be deemed as Part of the Personal Estate of such person who might have aliened the Land in case a purchase had been made (*y*); or in other words, if a sum of Money is in the hands of one without any other use than for himself, it will be Money, and the Heir cannot claim (*z*). But it is said that the Party must do something to determine his Election (*a*), something to show an intent to have it in Money, and so destroy "the transubstantiated real quality," as Lord *Hardwicke* phrases it (*b*). If the Fund be outstanding in Trustees, and it is necessary to come into a Court of Equity to obtain it, the Money, when obtained, would be personal property. And so it would also if the Trustees paid it without suit. This is supposing the Estate, when purchased, would be a *Fee Simple*, for it would be otherwise in case of its being an *Estate Tail* (*c*).

If upon an Agreement for the purchase of an Estate, any casualty happen after the time appointed for the payment of the purchase-money (*d*), or as some Cases say between the Articles

(*t*) Vid. note C. to 3 P. Wms. 222, and the cases there mentioned, particularly *Edwards v. Countess of Warwick*, 2 P. Wms. 171; and see *Wheldale v. Partridge*, 8 Ves. 235, over-ruling *Walker v. Denne*, 2 Ves. jun. 170, 172. *Hungerford v. Knight*, Trin. 9 & 10 Geo. 2. 1736, MS. *Shedding v. Goodrick*, 8 Ves. 497. *Hooper v. Goodwin*, 18 Ves. 166.

(*u*) *Hutcheson v. Hammond*, 3 Bro. C. C. 148.

(*x*) *Lawes v. Bennett*, 1 Cox, 167, followed by Lord Eldon, in *Townley v.*

Bedwell, 14 Ves. 591.

(*y*) *Chichester v. Bickerstaff*, 2 Vern. 296; and see *Pulteney* against *Darlington*, 1 Bro. C. C. 236; but see *Chaplin v. Horner*, 1 P. Wms. 483. & 1 P. Wms. 532.

(*z*) 1 Bro. C. C. 238.

(*a*) *Edwards v. Countess of Warwick*, 2 P. Wms. 175.

(*b*) *Trafford v. Bockman*, 3 Atk. 446.

(*c*) 1 Bro. C. C. 236.

(*d*) 2 Atk. 400. *Stint v. Bailey*, 2 P. Wms. 220.

for the Purchase and a Conveyance (e), the Purchaser bears the loss (f); and on the other hand he will be entitled to any benefit which may accrue.

*The same principles apply also as between the Repre- [*368
sentatives of the Vendor and Vendee; the death of either of
the Parties to the Contract not affecting it (g). The Heir of the
Vendee, (even a collateral Heir) (h), is entitled to insist on the
completion of a Contract to purchase Land out of the personal
Estate of his Ancestor (i), and this, though the Ancestor would
have had an Estate-Tail which he might have barred (k); but
if the terms of the Contract do not appear, or there is not a good
Title, he can neither claim the Estate or the Money (l). If,
however, a Testator contracts for an Estate, but dies before the
purchase is completed, and after his death the Contract is dis-
solved, not on account of any imperfection in the Contract, or
because a good Title cannot be made, but because the pur-
chase-money cannot be paid so soon as is necessary, the pur-
chase-money will not sink into the Personal Estate, but must be
laid out in other Lands, to the same uses as the Testator had
devised the Lands contracted for (m). *In like manner, [*369
where there is an effectual agreement for the Sale of an Estate,
by one then entitled (n), the Heir of the Vendor is bound to per-
form it; and the personal Representative may enforce it against
the Vendee; and such personal Representative is entitled to the
purchase money (o); but where the Court holds the Contract
cannot, or ought not, to be performed, there the real Estate
belongs to the Heir of the Person contracting to sell (p). If
the Land agreed to be sold be *Borough English* Land, the younger
Son, after the death of the Father, will be bound to carry the

(e) White and Nutt, 1 P. Wms. 61; and see Pool v. Shergold, 2 Bro. C. C. 118. Paine v. Meller, 6 Ves. 349.

(f) 6 Ves. 349.

(g) 1 Toth. 4, 5. Legard v. Hodges, 2 Vez. 478. Gill and Vermedun, 2 Freem. 199. Seton v. Slade, 7 Ves. 274. Winged v. Lifebury, 2 Eq. Abr. 32; and see Jackson against Lever, 3 Bro. C. C. 605, a very hard case; see also Lacon v. Mertins, 3 Atk. 1, and Potter v. Potter, 1 Vez. 437.

(h) Lingen v. Sowray, 1 P. Wms. 172. S. C. in Gilb. 91, and in 10 Mod. 39. Countess of Warwick and Edwards, 2 P. Wms. 271. approved, For. 90. Kettleby v. Atwood, 1 Vern. 399, 471. Vernon v. Vernon, 2 P. Wms. 223.

(i) Seton v. Slade, 7 Ves. 274. Buckmaster v. Harrop, 7 Ves. 341, and S. C. 13 Ves. 472, and in MS; and see Langford and Pitt, 2 P. Wms. 629.

Parsons and Freeman, Ambler, 116. Broom v. Monk, 10 Ves. 611, 614. In the above case of Buckmaster v. Harrop, it was held an Executor is not bound to take advantage of the statute of Frauds.

(k) Vid. 1. P. Wms. 719.

(l) Green v. Smith, 1 Atk. 573. Rose v. Cunyngham, 11 Ves. 554, 555. Lacon v. Mertins, 3 Atk. 1. Buckmaster v. Harrop, 11 Ves. 608. S. C. on appeal, 13 Ves. 471, 2.

(m) Whittaker v. Whittaker, 4 Bro. C. C. 31; and see what is said of that case in Broome v. Monk, 10 Ves. 614.

(n) 1 Anstr. 14.

(o) Baden v. Countess of Pembroke, 2 Vern. 215. Lacon v. Mertins, 3 Atk. 1. Holt v. Holt, 2 Vern. 322.

(p) Attorney-General v. Day, 1 Vez. 220.

Agreement into Effect (*q*) ; and in all cases of this description the Creditors of the Bargainor may compel the Heir to convey the Land (*r*). Such is the converting effect of a mere Agreement, that a Covenant by a Joint-tenant to sell, severs the Joint-tenancy in Equity, though not at Law (*s*). And where a Surrender by a Copyholder would bar the Widow's Free Bench, a Contract to sell or Surrender has the same effect (*t*).

If a Tenant for Life, having a power to grant, covenants to make such a grant, this will in Equity, bind the Remainder-man, it being in the nature of an execution of a Power. So, if *370] a Tenant for Life agrees *to make a Lease pursuant to his Power, the Remainder-man is bound (*u*). And in like manner Contracts for Jointures will bind the Remainder-man, though made only in pursuance of a Power to make Jointures. Contracts for a valuable consideration to execute a Power, or to make a charge of any description under a Power, are also binding on the Remainder-man (*x*).

Upon the same principle that what is agreed to be done is considered as done, it has been holden, that the Personal Estate of a Man, who in consideration of Marriage with an Orphan of a Citizen of London, covenanted to take up his Freedom of the City, should be divided according to the Custom, in the same manner as if the Freedom had been taken up in performance of his Covenant (*y*).

It has been said, that *in general*, it is a Rule that what is contracted to be done for a valuable consideration is considered as done (*z*), and it seems proper so to qualify the Rule ; for though it operates in the various instances that have been mentioned, it is not without its exceptions. A Covenant, for instance, to levy a Fine (*a*), or to suffer a Recovery (*b*), has not the same *371] effect as a Fine or *Recovery actually levied or suffered, the Issue in Tail not being bound (*c*) ; but if the Covenant relates to an Entail in Equity, the Court will compel the Heir to comply

(*q*) *Hinton v. Hinton*, 2 Ves. 633.

(*r*) *Best and Stamford*, 1 Salk. 154.

(*s*) *Sic dict.* *Browne v. Raindle*, 3 Ves. 257 ; and see *Partriche v. Powlet*, 2 Atk. 54. *contra dict.* 2 Vern. 45. 63.

(*t*) *Hinton v. Hinton*, Ambl. 277. S. C. 2 Ves. 633, overruling *Musgrave v. Dashwood*, 2 Vern. 63, a case relied on by Mr. Wooddeson ; see Lect. 3d vol. p. 470 ; and see 8 Ves. 256. and 3 Ves. 257.

(*u*) *Shannon v. Bradstreet*, 1 Sch. & Lefr. 52.

(*x*) *Ibid.* 60.

(*y*) *Frederick v. Frederick*, 1 P. Wms. 710, S. C. 1 Str. 455, and 1 Bro. P. C. 7.

(*z*) *Ante.*

(*a*) See *Frederick v. Frederick*, 1 P. W. 720 ; see also *Prec. C. H.* 279 and 425, and 2 P. Wms. 626, 652, 2 Vern. 306 ; and see *Lord Coventry's Case*, best reported at the end of *Francis's Maxims in Equity*.

(*b*) See *Collins and Plummer*, 1 P. Wms. 104, and *Lord Coventry's Case* at the end of *Francis's Maxims in Equity*. *Attorney-General and Day*, 1 Ves. 223, *Cotter and Laver*, 2 P. Wms. 626, and what is said *arg o.* in *Holt v. Holt*, 2 P. Wms. 652 ; and 1 Atk. 9. Ambl. 278, 1 Dick. 34, 3 Bro. 538. 1 Lev. 237.

(*c*) 9 Mod. 19. 2 Ves. 634.

with the bargain made by his Ancestor (*d*). So, a mere Contract for the Sale of an Estate does not entitle the Vendee to cut Timber before the payment of the purchase-money (*e*). Nor does the Rule hold in regard to Dower, the Wife, as before observed, not being entitled to it out of an estate, agreed only to be purchased by, and not actually conveyed to, her Husband (*f*). So, if a Body Corporate, having a Power, make an Agreement for the Renewal of a Lease, and the Fine is paid, and a new member is introduced among them, it may be doubtful whether the Agreement could be enforced against such new member (*g*). He would certainly be entitled to his proportion of the Fine paid on the Renewal (*h*). These instances are sufficient to show that the Equity maxim, "what is agreed to be done is considered as done," is not universally true.

With these preliminary remarks on the effect of a mere Agreement in Equity, we may now proceed to consider, *what Agreements will be decreed to be specifically performed*.

It may be stated, as a general Rule, that an Agreement, to be specifically performed, must be according to the *forms* prescribed by Law, and between parties **able* and *willing* to contract, [*372 and that the Agreement must be *certain* and *defined*, *equal* and *fair* (*i*).

The doctrine in Equity as to the *ability* of Parties to contract, is, in general, governed by the Rules of Law on that subject, except in regard to *Infants* and *Femes Covert*. The doctrine as to *Infants* has already been adverted to, and the contracts of *Femes Covert* will be observed upon hereafter. It is not, therefore, necessary to enlarge upon that topic, except only to observe, that a specific performance of an Agreement will be decreed against one, who after the Agreement becomes a Lunatic, if the legal Estate is vested in Trustees; and so also, though the legal Estate is in the Lunatic, if the Vendee is content to let it remain in him (*k*).

With respect to the *Forms* required by Law in Agreements, it is to be observed that by the Statute (*l*), no Action shall be

(*d*) Sic. dict. in *Coventry v. Coventry*, 9 Mod. 19.

(*e*) *Crockford v. Alexander*, 15 Ves. 138. *Rawlins v. Burgis*, 2 Ves. & Bea. 387.

(*f*) See *Crabtree and Bramble*, 3 Atk. 687.

(*g*) See *Dr. Wynne v. Bampton*, 3 Atk. 476.

(*h*) *Ibid*.

(*i*) *Vid. Lord Walpole v. Lord Oxford*, 3 Ves. 420. *Buxton v. Lister*, 3 Atk. 285. *Underwood and Hitchcox*, 1 Ves. 279. *Franks v. Martin*, 1 Eden. p. 323.

(*k*) *Owen v. Davis*, 1 Ves. 82; and see *Hall v. Warren*, 9 Ves. 605.

(*l*) 29 Car. 2, c. 3, s. 4. It seems Sir Leoline Jenkins had some share in the framing of this Act; especially of that provision in it which exempts the Wills of Soldiers and Seamen from the strict formalities required in the Wills of other Persons, leaving them to the full privilege of the old Roman Military Testaments. [See *Wynn's Life of Sir Leol. Jenkins*, 1 vol. p. 3.] The Lord Keeper Guilford had also a great share in the penning of the Statute of Frauds, as well as Sir Matthew Hale. Lord Nottingham said of that Statute that every line was worth a subsidy. [See *North's Life of Lord Keeper Guilford*, p. 108, 9.]

brought whereby to charge a person upon any Agreement made upon consideration of Marriage, or upon any Contract or Sale of Lands, Tenements, or Hereditaments, or any interest in or concerning the same, unless the Agreement upon which such *373] Action shall be brought, or *some Memorandum or Note thereof, is in *Writing*, and *signed by the party* charged therewith, or some other person thereunto by him lawfully authorized; but an Agreement to be good within the Statute need not be *sealed* (m).

The reason of the provision in respect to Marriage seems to be, that in no case can there be supposed so many unguarded expressions and promises used, as in addresses in order to Marriage, where many passages of gallantry usually occur (n). An Agreement, therefore, made by the Husband before Marriage, and not reduced into Writing, is within the Statute (o); nor will a recognition *after* the Marriage, of a Parol Promise before Marriage, take the case out of the Statute (p); (1) but a *Letter* containing the terms of a Marriage Agreement takes the case out of the Statute provided it is signed by the writer (q).

Marriage is not considered as a part-performance of a Parol Agreement, made before Marriage, so as to take it out of the Statute of Frauds (r).

Sales by Auction (excepting Sales under a Decree) (s) are *374] within the Statute of Frauds (t); and *the Auctioneer is considered as the Agent for both Parties (u).

Wherever the substance of the statute has been complied with in the material part, the forms have never been much insisted on (x). If, therefore, a *Letter* contains the terms of the Agreement—the amount of the consideration, and the subject matter of the Contract (y); (2) or if it refers to another Paper which

(m) *Wheeler v. Newton*, Prec. Ch. 16.

(n) Vid. what is said Arg. in *Montacute v. Maxwell*, 1 P. Wms. 619.

(o) *Ibid.* 618.

(p) *Randall v. Morgan*, 12 Ves. 73; but see *Hodgson v. Hutchinson*, Vin. Abr. tit. Contract and Agreement, (H.) Ca. 34.

(q) *Bird v. Blosse*, 2 Ventr. 361, *Moore v. Hart*, 2 Ch. Rep. 147. *Wankford v. Fortherley*, 2 Vern. 322.

(r) *Montacute v. Maxwell* 1 P. Wms. 618. *Taylor v. Beech*, 1 Ves. 297;

and see dict. *Redding v. Wilks*, 3 Bro. C. C. 400. *Dundas v. Dutens*, 1 Ves. jun. 199.

(s) *Attorney General v. Day*, 1 Ves. 218, relied upon in *Blagden v. Bradbear*, 12 Ves. 472.

(t) *Blagden v. Bradbear*, 12 Ves. 466, and see *Mason v. Armitage*, 13 Ves. 25. *Higginson v. Clowes*, 15 Ves. 516.

(u) *Fairbrother v. Prattent*, and another, 1 Daniell, p. 67.

(x) *Welford v. Beazely*, 3 Atk.

503.

(y) *Kennedy v. Lee*, 3 Meriv. 441.

(1) A settlement after marriage, in pursuance of a parol agreement entered into before marriage, is not valid, so as to affect the rights of third persons; otherwise, if made in pursuance of a written agreement. *Read v. Livingston*, 3 Johns. Ch. Rep. 481.

(2) A contract for the sale of land, in the form of a penal bond, conditioned to make titles to the plaintiff, &c., decreed to be specifically executed. *Telfair v. Telfair*, 2 Des. 271.

contains the Terms, parol Evidence will be admitted to show what was the thing so referred to (z), and it is a sufficient written Agreement (a); and a Letter has been held binding, though the person did not intend to be bound (b), or looked to the execution of a more formal Instrument (c); and even a letter sent to an agent (d), or other third person (e), has been considered as a sufficient signing within the Statute. Whether a note, written in the third person, viz. "Mr. T. proposes, &c." making thereby an offer to purchase, amounts to a Contract in writing, signed within the Statute of Frauds. is not decided (f).

Cases, however, upon the effect of Letters, have *been [*375 thought to have gone too far (g); nor will the Court decree a performance unless it can collect, upon a fair interpretation of the Letters, that they import a concluded Agreement; if it rests reasonably doubtful, whether what passed was only Treaty, let the progress towards the confines of Agreement be more or less, the Court will rather leave the parties to Law than specifically to perform what is doubtful as a contract (h). (1)

Where there is a complete agreement in writing, and a person who is a Party, and knows the contents, signs as a Witness only, this has been held a sufficient signing within the Statute (i). So if the Agreement begins "I, A. B. agree, &c." this is a sufficient signing (k); but altering the draft of the conveyance has not been considered to amount to a signing of the Agreement (l); and though the party writes the Agreement, it is ineffectual unless it be also signed (m). The mere circumstance of the name of the Party being written by himself in the body of a

(z) *Clinan v. Cooke*, 1 Sch. & Lef. 175.

33, overruling what is said in *Binstead v. Coleman*, Bunb. 65, and the dictum in *Parteriche v. Powlett*, 2 Atk. 383; and see *Brodie and St. Paul*, 1 Ves. jun. 326.

(a) *Tawney against Crowther*, 3 Bro. C. C. 161, 319.

(b) *Welford v. Beazely*, 1 Ves. 8. S. C. 3 Atk. 503. See what is said 3 Taunt. 172, and *Kennedy v. Lee*, 3 Meriv. 441.

(c) *Fowle v. Freeman*, 9 Ves. 351.

(d) 1 Ves. 8.

(e) *Moore v. Hart*, 1 Vern. 110. *Welford v. Beazely*, 3 Atk. 503. *Cooke v. Tombs*, 2 Anstr. 420.

(f) *Morison v. Turnour*, 18 Ves.

(g) *Allen v. Bennett*, 3 Taunt. 173.

(h) *Huddleston v. Briscoe*, 11 Ves. 591, quoted with approbation in *Stratford v. Bosworth*, 2 Ves. & Bea. 346; and see that case.

(i) *Welford v. Beazely*, 3 Atk. 503; and see *Coles v. Trecothick*, 9 Ves. 234.

(k) *Knight v. Cuckford*, 1 Esp. N. P. C. 190, cited 2 Bos. & Pull. 239, by Lord Eldon.

(l) *Hawkins v. Holmes*, 1 P. Wms. 770.

(m) *Bawdes v. Amhurst*, Prec. Ch. 402.

(1) A man turned away his wife and infant daughter, without any provision, and took home another woman as his wife. Many years afterwards, he wrote a letter to his daughter, requesting her to return and live with him, and promising to make her heir to his property. She, with her mother's consent, accepted the invitation. Not long afterwards, he compelled her to leave his house again, on the allegation of disobedience, and made his will, by which, he bequeathed all his estate to the woman with whom he lived, and to some others after her death. Upon these facts, it was resolved, 1. That the daughter, under the circumstances, owed no services to the father, and was capable of contracting with him; and 2. That the letter contained a valid contract, which chancery would enforce against the executors and devisees of the father. *Gray v. James' Exrs.* 4 Des. 185.

Memorandum of Agreement for a Lease will not constitute a signature within the meaning of the Statute of Frauds (n).

It has been questioned, whether, if a Man be in the habit of printing instead of signing his name, he may not be said to sign *376] by the printed name as well as *his written name (o). This doubt may, perhaps, be resolved by considering another Case which has an analogy. The Act 33 Hen. 8, c. 21, enables the King to give his assent to Bills by Letters Patent under his Great Seal, *signed with his own hand*; &c. but King William, in the last public act of his glorious life, stamped his name to Letters Patent of that description, and their validity was not questioned.

With respect to the *signing* of an Agreement, by an *Agent lawfully authorized*, it has been holden, that the authority of the Agent need not be in writing (p); but the authorized Agent must sign the Agreement; his Clerk's signature is not sufficient (q).

An Auctioneer, on the Sale of Estates by Auction, being considered as the Agent of both Parties, the Seller and the Buyer, his *receipt*, if it contains in itself, or by reference to something else, shows what the Agreement is, has been considered as a note or memorandum sufficient to satisfy the requisition of the Statute (r). (1)

There are, however, Cases, where, though an Agreement as to Lands is not in writing, it will be decreed to be performed; as where a parol Agreement has been *partly performed*, and is admitted, or proved (s), (2) as it may be in such cases by parol *377] Evidence *produced on the hearing of the cause (t), or, on some occasions, before the Master (u); but where parol evidence is admitted it must clearly appear that *that* very Agreement was in part executed (x). (2)

(n) Stokes v. Moore, 1 Cox, 219.

(o) Saunderson v. Jackson, 2 Bos. & Pull. 239.

(p) Waller v. Cox, Vin. Abr. tit. Contract and Agreement, (H.) Ca. 45. Coles v. Trecothick, 9 Ves. 250. Clinan v. Cooke, 1 Sch. & Lef. 31. The note in 7 East, 465, stating that the Agent's Authority must be in writing, is a mistake.

(q) Blore v. Suttan, 3 Meriv. 237.

(r) Coles v. Trecothick, 9 Ves. 252. S. C. MS. Emmerson v. Heelis, 2 Taunt. 32. White v. Procter, 4 Taunt. 212. Keymis v. Procter, 3 Ves. & Bea. 57.

(s) See Daniel v. Davidson, 16 Ves.

249.

(t) 1 Ves. 221.

(u) Allan v. Bower, 3 Bro. C. C. 149. S. C. noticed 1 Sch. & Lefr. 37. Boardman v. Mostyn, 6 Ves. 467; but see 3 Bro. C. C. 149, and 1 Ball and Bea. 265, and Savage v. Carroll, 1 Ball & Bea. 551, in which case it is laid down that an Inquiry or Issue is only directed, where, from contradictory Evidence, a doubt arises in the mind of the Court, or from the circumstance of Witnesses being discredited after the case has been proved.

(x) Lindsay v. Lynch, 2 Sch. & Lefr. 8.

(1) So, where the auctioneer, on the sale of real estate, at auction, immediately on knocking down the hammer, wrote the name of the purchaser in a printed paper containing the terms of sale, which was also signed by the auctioneer, it was held, that this was a sufficient signing within the statute of frauds, so as to bind the purchaser. *McComb v. Wright*, 4 Johns. Ch. Rep. 659.

(2) Vide *Phillips v. Thompson*, 1 Johns. Ch. Rep. 151. *Parkhurst v. Van Cort-*

In these cases, relief is administered on the ground of *Fraud* (y), in suffering the Party to proceed on the Agreement, and then, unconscientiously, on its not being in Writing; and is a species of Fraud cognizable only in Equity (z). It is true, *Mr. Justice Buller*, observed, in one or two Equity cases (a), that part performance takes a Case out of the Statute, *at Law* as well as in *Equity*; but he afterwards abandoned so untenable a position (b). (1).

The first Case in which relief was given on the ground of part-performance, is frequently said (c) to have been *Foxcraft v. Lyster* (d); but from some Reports of that Case (e) it rather seems to have proceeded on another, and very indisputable ground; on the *Fraud* of the Heir, in preventing the Lessor, who was dying, executing a Lease. Certain it is, *how- [*378 ever, that very soon after the passing of the Statutes of Frauds (f) this species of equitable relief was administered.

If, therefore, it be clearly shown what the Agreement was, and that it has been *partly performed*, that is, that an act has been done, not a mere voluntary act (g), or merely introductory or ancillary to the agreement (h), but a part execution of the substance of the Agreement (i); an act, in short, unequivocally referring to, and resulting from, the Agreement, and such, that the Party would suffer an Injury, amounting to Fraud (k), by the refusal to execute that Agreement; in such Case, the Agreement will be decreed to be specifically performed (l).

Wherever, therefore, a parol Agreement is sought to be established on the ground of part-performance, if the Statute is pleaded, the answer must deny the acts charged of part-performance (m).

(y) *Savage v. Foster*, 2 Mod. 38. 1 Sch. & Lefr. 130. *Blore v. Sutton*, 3 Meriv. 246, *Morphet v. Jones*, 1 Swanst. 181.

(z) 1 Bro. C. C. 417.

(a) *Brodie v. St. Paul*, 1 Ves. jun. 333; and see 1 Bro. C. C. 417.

(b) See what is said in *Cooth v. Jackson*, 6 Ves. 39. *O'Herlihy v. Hedges*, 1 Sch. & Lefr. 123.

(c) See what Lord Redesdale says, *Bond and Hopkins*, 1 Sch. & Lefr. 433, and his Treatise Pl.

(d) Cited 2 Vern. 456.

(e) See the Report of the case in *Gilbert's Eq. Reports*, p. 11, and *Colles's Parl. Cases*, 108.

(f) 29 Car. 2, c. 3.

(g) As in *Robertson against St. John*, 2 Bro. C. C. 140.

(h) See 1 Bro. C. C. 412, *Lacon v. Mertins*, 3 Atk. 4.

(i) *Cooke v. Tombs*, 2 Anstr. 424. *Gunter against Halsey*, Amb. 586.

(k) *Clinan v. Cooke*, 1 Sch. & Lefr. 41; and see *Morbett v. Jones*, 1 Swanst. 181.

(l) *Gunter v. Halsey*, Amb. 586. *Frame and Dawson*, 14 Ves. 386, and *Lewis and Clitherow*, MS. The case contra. *Hollis and Whiting*, 1 Vern. 151, cannot be considered as Law.

(m) *Bowers v. Cator*, 4 Ves. 92. *Wills v. Stradling*, 3 Ves. 378.

Landt, 1 Johns. Ch. Rep. 273. It is not sufficient that the act is evidence of some agreement; but it must show unequivocally and satisfactorily, the existence of the particular agreement set forth in the bill. *Phillips v. Thompson*, *ut supra*.

(1) The doctrine that the construction of the statute of frauds, as to part performance, is the same in a court of law, as in equity, denied to be law, by *Kent*, Ch. J. in *Jackson v. Pierce*, 2 Johns. Rep. 224.

The ground on which the Court acts in these cases is, as before observed, *Fraud*, in refusing to perform, after performance by the other Party (n); and not because the Agreement was not *379] within the original *conception of the Statute (o). The allowing any other construction upon the Statute of Frauds would be to make it a guard and protection to Fraud, instead of a security against it, which was its object (p).

It was, however, the opinion of *Lord Alvanley*, that the Court had gone rather too far in permitting part-performance, and other circumstances, to take Cases out of the Statute, and then, unavoidably, perhaps, after establishing the Agreement, to admit parol Evidence of the contents of that Agreement. "Part-performance might be evidence of some Agreement; but of what, must be left to parol Evidence. I always thought," says he, "the Court went a great way. They ought not to have held it Evidence of an unknown Agreement, but to have had the Money laid out, repaid. It ought to have been a Compensation. Those Cases are very dissatisfactory. It was very right to say, the Statute should not be an engine of Fraud: therefore compensation would have been very proper. They have, however, gone farther; saying, it was clear there was some Agreement, and letting them prove it. But how does the circumstance of a Man having laid out a great deal of Money prove that he is to have a Lease for ninety-nine years? The common sense of the thing would have been to let them bring an Action for the Money. I should pause upon such a Case (q)." Impressed, probably, with similar feelings, *Lord Eldon*, early in that judicial career *380] which has immortalized him as a Lawyer, expressed *a determination not to go one iota farther than the Cases (r); and another great Judge, *Lord Redesdale*, made a similar resolution (s).

A parol Agreement for a Lease made by a Tenant for Life, in pursuance of a Power, if partly performed, might be enforced against the *Tenant for Life*, but it could not be enforced against a *Remainder-man*; for though the Tenant for Life is bound, it is principally on the ground of Fraud, which is personal, and which does not apply to the Remainder-man (t).—If the Remainder-man after the death of the Tenant for Life acquiesced, it would be different (u). The only way in which a Remainder-

(n) *Whitbread against Brockhurst*, 1 Bro. C. C. 413. *Hare v. Shearwood*, 1 Ves. jun. 243. *Buckmaster v. Harrop*, 7 Ves. 346.

(o) 1 Bro. C. C. 413. 417.

(p) *Walker v. Walker*, 2 Atk. 100.

(q) *Foster v. Hale*, 3 Ves. 712. &c.; and see what is said in *Wills v. Stradling*, 3 Ves. 382; and in *Attorney-General v. Day*, 1 Ves. 221.

(r) *Cooth v. Jackson*, 6 Ves. 32. 37;

and see what is said by Lord Redesdale in 2 Sch. and Lefr. 5, and by Lord Manners, in *Toole v. Medlicott*, 1 Ball & Bea. 404.

(s) *Lindsay v. Lynch*, 2 Sch. & Lefr. 5.

(t) *Shannon v. Bradstreet*, 1 Sch. & Lefr. 72.

(u) *Ibid.* 73. *Styles v. Cowper*, 3 Atk. 692.

man could be affected with Fraud would be by showing that an expenditure had been permitted by him, with a knowledge that the Party had only a parol Agreement from the Tenant for Life (x).

The Cases are numerous in regard to what acts are to be considered as a *part-performance* (y).

If the Vendee, on a parol Agreement for the Sale of Lands, is let into Possession by the Vendor, this has been held to amount to a *part-performance* (z); (1) *a fortiori*, if the Party enters and improves them (a), or builds (b), (1) and what was the parol Agreement clearly appears, it will be enforced (c).

Between Landlord and Tenant, when the Tenant is in Possession at the date of the Agreement, and only continues in Possession, in many cases that continuance amounts to nothing; but admission into Possession having unequivocal reference to contract, has always been considered an act of *part-performance* (d). (2)

The *Payment of Money*, either in part by way of earnest, or in full for the purchase, is not, it seems, deemed a *part-performance* (e); (3) but the Cases are contradictory, and the point unsettled (f). In some cases it has been holden that, if a *substantial part* of the purchase-money is paid, it is a *part-performance*, but that a *small sum* paid, the twentieth part of the pur-

(x) *Blore v. Sutton*, 3 Meriv. 247.

(y) See 3 Ves. jun. 39, and the cases there cited.

(z) *Butcher v. Stapely*, 1 Vern. 365. *Pyke v. Williams*, 2 Vern. 455. *Wheeler v. Newton*, Prec. Ch. 16. Ibid. 561. *Lockey v. Lockey*, Prec. Ch. 519. 2 Str. 783, and the cases cited in the note, 1 Atk. 12. 2 Freem. 269; and see *Lacon v. Mertins*, 3 Atk. 4. *Kine v. Balse*, 2 Ball & Bea. 348.

(a) *Hawkins v. Holmes*, 1 P. Wms. 770. *Toole v. Medlicott*, 1 Ball & Bea. 404.

(b) *Savage and Foster*, 2 Mod. 37.

5 Vin. Abr. 522. 2 Freem. 268.

(c) *Boardman v. Mostyn*, 6 Ves. 470.

(d) *Morphett v. Jones*, 1 Swanst. 181.

(e) *Lord Pengall and Ross*, 2 Eq. Abr. 46. *Leake and Morris*, 2 Ch. Cas. 135. *Seagood and Meale*, Prec. Ch. 560; but see 2 Freeman 281, and the authorities mentioned in the note to *Clinan v. Cooke*. 1 Sch. & Lefr. p. 40, and same book p. 129.

(f) See what is said in *Ex parte Hooper*, in re *Hewett*, 1 Meriv. 9.

(1) Vide *Wetmore v. White*, on appeal, 2 Caines' Cas. in Error, 87. *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 273. 8. C. on appeal, 14 Johns. Rep. 15.

(2) But where the vendee went into possession without the known permission of the vendor, it was held to be no *part-performance*. *Givens v. Calder*, 2 Des. 190.

(3) It seems now to be well settled, that payment of the purchase money, in pursuance of a parol agreement for the sale of lands, is a *part-performance*, which will take the case out of the statute of frauds. *Wetmore v. White*, 2 Caines' Cas. in Error, on appeal, 87.

But, it has been decided, that a deposit of a part of the purchase money, by the vendee, with her agent, to be paid to the vendor, whenever he should execute the deeds, of which the vendor had notice, is not such a *part-performance* as will take the case out of the statute. *Givens v. Calder*, *ut supra*.

chase-money, for instance, is not (g). But *Lord Redesdale* appears to have thought that payment of the purchase-money will in no case amount to a part-performance (h). Giving of *Directions for Conveyances*, *and taking a View of the Estate, have been resolved not to be a part-performance (i). So the putting of a Deed into the hands of a Solicitor to prepare a Conveyance is not a part-performance of a parol Agreement to convey (k). (1) And where there was a parol Agreement for a compromise, and a division of the Estate by Arbitration, acts done by the Arbitrators towards the execution of their duty, such as surveying, &c. were not considered as acts of part-performance (l).

So where there was a parol Agreement for the purchase of a Lease, and that upon the Plaintiff's procuring a release of right from a Stranger, the Defendant would convey, and the Plaintiff procured the release for a valuable consideration, this was not held a part-performance entitling the Party to a specific performance (m).

If a Bill be filed for the specific performance of a parol Agreement, and the Defendant admits the Agreement, and submits to perform it, it will of course be decreed (n). But if there be a Plea of the Statute of Frauds, and no parol Agreement confessed by the Answer, the Court has in no case compelled the Defendant to execute it (o). And though the Agreement is admitted by the Answer, (and it *seems it must be admitted or denied) (p), yet, if the Defendant insists upon the Statute of Frauds, a specific performance will not be enforced (q). As a Plea of the Statute cannot in any case be a

(g) See *Maine v. Melbourne*, 4 Ves. 720. *Lacon and Mertins*, 3 Atk. 4. In *Simons v. Cornelius*, 1 Ch. Rep. 241, a case determined before the Statute of Frauds, twenty shillings paid as earnest was considered as an inconsiderable execution of the agreement, and a demurrer to a bill for performance of the agreement was allowed.

(h) *Clinan v. Cooke*, 1 Sch. & Lefr. 40, and the cases mentioned in note (a.)

(i) *Clerk v. Wright*, 1 Atk. 12. *Whaley v. Bagnal*, 6 Bro. P. C. 45; and see 3 Bro. C. C. 400.

(k) *Redding v. Wilkes*, 3 Bro. C. C. 400. *Cooke v. Toombs*, 2 Anstr. 425; but see *Edge v. Worthington*, 1 Cox, 212, in which case a delivery of deeds was considered as a part-performance of an agreement to execute a

mortgage.

(l) *Cooth v. Jackson*, 6 Ves. 41.

(m) *O'Reilly v. Thompson*, 2 Cox, 271.

(n) *Ambl.* 586. *Spurrier v. Fitzgerald*, 6 Ves. 548.

(o) *Whitchurch against Bevia*, 2 Bro. C. C. 567. *Whaley v. Bagenal*, 6 Bro. P. C. 45.

(p) See *Child and Godolphin*, mentioned 2 Bro. C. C. 556, and the principal case; see also 6 Bro. P. C. 45, and 1 Bro. C. C. 404.

(q) *Rowe v. Teed*, 14 Ves. 375. *Cooth v. Jackson*, 6 Ves. 39. *Blagden v. Bradbear*, 12 Ves. 471. *Walters v. Morgan*, 2 Cox, 369, *Prec. Ch.* 208. *Gilb. Eq. Cas.* 35, contra *Child v. Godolphin*, 1 Dick. 39. *Savil v. Holse*, Mich. 9 Geo. 2, 1735. MS.

(1) So, where in pursuance of a parol agreement for the sale of land, the vendor procured the deeds to be drawn, took them home, and wrote to the vendee that they were ready, and requested her to attend and settle the business, but he died before the parties met; it was held, that this was not such an agreement in writing as is required by the statute of frauds. *Givens v. Calder*, *ut supra*.

bar to a discovery of the fact of an Agreement, and as the benefit of the Statute may be had if insisted on by Answer, there can be no use in pleading it in bar of relief (r). Though a Defendant must answer inquiries as to the fact of a parol Agreement having been made or not, yet if by the death of the Party that discovery cannot be made immediately from him, evidence of his declaration of his being owner of the Premises is inadmissible (s). And though the Defendant admits the parol Agreement, but does not submit to perform it, yet if he does not insist on the Statute, he is taken to have renounced it, and a specific performance will be decreed, as in that case there is no danger of perjury; many cases support that proposition (t).

*If a Plaintiff in a Bill for a specific performance proves [*384 an Agreement different from that in the Bill, and the Answer states an Agreement different from both, the Bill, in strictness, ought to be dismissed; but where there have been acts of considerable expenditure, a specific performance has been decreed according to the Agreement admitted in the Answer (x).

Where a Plaintiff states one Agreement in his Bill, and the Defendant by his Answer admits a different Agreement, the Plaintiff, it seems, may amend his Bill, stating the Agreement as admitted by the Defendant, and praying a Decree accordingly (y); but where the prayer of the original Bill was for the execution of an Agreement, and the Defendant denied the Agreement stated in the Bill, but admitted a different Agreement, and the Plaintiff amended his Bill, continuing to insist on the original Agreement, but praying in the alternative, if not entitled to that, to have execution of the admitted Agreement, the Bill was dismissed, without prejudice to a Bill for performance of the admitted Agreement (z). The reason of this appears to be, the dangerous consequence which might ensue if a Plaintiff was allowed to take the chance of getting Witnesses to swear to the Agreement as alleged by him, and *if he fails in that, to [*385 succeed upon the Defendant's admission (a).

It seems that an Agreement for a *separate Maintenance* will

(r) Redesd. Tr. Pl. 217, 3d Edit.

(s) Porchard v. Benyon, 1 Cox, 215.

(t) 2 Chan. Ca. 136. 143. 164. Nels. 343. Gilb. 437. Cooth v. Jackson, 6 Ves. 37; and see Moore v. Edwards, 4 Ves. 24. Whitechurch against Bevis, 2 Bro. C. C. 559. 2 Dick. 664. Whitbread against Brockhurst, 1 Bro. C. C. 416. Attorney-General v. Day, 1 Ves. 220. 1. Prec. Ch. 208. 274; but see Croyston and Banes, Prec. Ch. 260. S. C. 1 Eq. Abr. 19. Symondson v. Tweed, Prec. Ch. 374, S. C. 1 Eq. Abr. 19. In Ex parte Whitbread, 19 Ves. 212, the Lord Chancellor is reported to

say, as to the doctrine in the text, "in latter times the Court has inclined against it," but this, I apprehend, is a mistake of the Reporter. The authorities referred to by the Reporter to support that position prove the contrary.

(x) Mortimer v. Orchard, 2 Ves. jun. 243; and see what is said in Lindsay v. Lynch, 2 Sch. & Lefr. 7.

(y) Lindsay v. Lynch, 2 Sch. & Lefr. 9, and 11 in note.

(z) Ibid. 1.

(a) Lindsay v. Lynch, 2 Sch. and Lefr. 10.

not be enforced where such Agreement rests in Articles between the Husband and the Wife; the Spiritual Court being considered as having exclusive cognizance of the rights and duties arising from the state of Marriage. There are, however, conflicting decisions on this subject.

The Court, except in some early Cases (b), has never decreed the establishment of a separation between Husband and Wife, and compelled a Husband to pay a separate Maintenance to his *386] Wife (c), *without some Agreement between them for that

(b) See *Lasbrook v. Tyler*, Chan. Rep. 44.

(c) During the Usurpation the Court of Chancery exercised a Jurisdiction in cases of Alimony, there being then no spiritual courts, nor any toleration of the civil law; and ten Judges certified in Mich. Term 1662, that such decrees for alimony were confirmed by the act for confirmation of judicial proceedings; [See Ch. Rep. 224.] but upon the re-establishment of Courts Christian, the Court of Chancery no longer retained this Jurisdiction; insomuch, that when afterwards a Bill was brought for alimony in the Court of Chancery, a Demurrer was allowed. Vid. 2 vol. Shower's Rep. p. 283, and the cases there cited.

From the decision of the Lords Commissioners in cases of alimony, an appeal was allowed the Protector.

In a tract published in 1654, entitled, "Alimony arraigned, or the Remonstrance, &c. printed in 1654, Q. o." there is given the petition to the Lords Commissioners, and the Decree of the Commissioners. The mode of proceeding on these occasions appears on the face of the Decree.

"Lords Commissioners. Saturday, 24th of July 1652, between Theodosia Ivie, plaintiff, and Thomas Ivie, her husband, defendant.

Whereas, the Plaintiff having exhibited her petition (against the Defendant her Husband,) to be relieved for alimony, unto which the Defendant having put in his answer, divers witnesses were examined by Commission, and others were (by their Lordships directions) also examined by the Register, in the presence of counsel on both sides; and for the better clearing of the matters, and satisfaction of their Lordships, therein, their Lordships were also pleased themselves to examine several witnesses, viva voce; and the cause having taken up many days in hearing (after much debate, and pains spent therein; and upon full and deliberate hearing of what could be offered on both sides; and upon reading of the

said depositions, and of the indenture, made upon the marriage, whereby the estate of the Plaintiff's father is settled upon Sir John Brampton, Knight, & Wm. Booth, Esq. to the uses in the said indenture declared,) their Lordships were fully satisfied that there is good cause to give allowance for alimony to the Plaintiff; and do order and decree, that the Plaintiff have paid unto her the sum of 300*l.* by the year, which their Lordships intend to be had and raised out of the Plaintiff's father's estate, so settled in the said trustees as aforesaid until further order. And do therefore order, that the said Defendant, and the said trustees, shall authorize, or permit and suffer the Plaintiff, or whom she shall nominate and appoint, from time to time, quietly and without interruption, to receive the rents and profits of the said lands: and the several tenants of the premises are hereby ordered to pay the same accordingly, from our Lady-day last; and the said trustees, and the said tenants, in so doing, are to be saved harmless, by the decree of the court. But in case the said lands are in a greater yearly value than the said 300*l.* per annum; and that the said Defendant shall at any time signify so much unto their lordships, and undertake and sufficiently secure the payment of 300*l.* per annum (quarterly) unto the said Plaintiff by equal portions, to begin from our Lady-day last, then the said Defendant is hereby decreed to pay unto the said Plaintiff the said yearly sum of 300*l.* accordingly, until further order as aforesaid. And that the said trustees are, in such case, to permit and suffer the said Defendant and his assigns to receive and enjoy the rents and profits of the said father's estate, (any thing herein contained to the contrary notwithstanding.) Rob. Dod, Dep. Regis. The Defendant considered himself as much aggrieved by this decree, and brought an action against a Mr. Williamson, who detained his wife, and under the direction of Ld. C. Just. Roles, obtained a verdict for 100*l.* and an execution afterwards issued: but he filed his Bill in Equity for an in-

purpose ; but *Lord Hardwicke* seems, though reluctantly, to have thought such an Agreement might be decreed (*d*) ; and there are cases to that effect (*e*) ; *but the more recent and [*387 settled doctrine now appears to be, that this Court will not carry into execution articles of Separation *between Husband and Wife*. It recognises no power in them to vary the rights and duties growing out of the Marriage Contract, or to effect at their pleasure a partial dissolution of that Contract (*f*). In *Guth v. Guth*, it was determined, after great consideration, that *articles of Separation* may be specifically enforced, at the suit of the *Wife*, and this, though the Husband offered, by his Answer, to receive his wife again (*g*) ; but that decision has been much discountenanced by subsequent Judges (*h*) ; Those marriage cases (cases followed but not approved) (*i*), in which the Court has acted upon an Agreement to separate, have been, in general, where a *third party* has intervened, and the Agreement was not merely between the Husband and Wife (*k*), as *where [*388 Trustees have covenanted to indemnify the Husband against the Debts of the Wife, which forms a valuable consideration (*l*) ; or where a fortune has accrued to the Wife after separation (*m*). As against Creditors the Court will never decree an Agreement for a Separation where the Agreement rests between Husband and Wife only (*n*) ; but where the Husband was a Trader liable

junction, and it was obtained, and thereby the Plaintiff and others were enjoined, under the penalty of 500*l.* against proceeding on the judgment. Upon this, the Plaintiff petitioned, "the Parliament for the Commonwealth of England ;" but what was done upon this petition does not appear.

(*d*) *Lady Head v. Sir Francis Head*, 1 Ves. 17, 5. C. 3 Atk. 550.

(*e*) *Angier and Angier*, 60*th*. Eq. Rep. 152, 3. S. C. Prac. Ch. 496. *Lex Prætoris*, MS.

(*f*) *Worrall v. Jacob*, 3 Meriv. 268.

(*g*) *Guth v. Guth*, 3 Bro. 614 ; and see *Fitzer v. Fitzer*, 2 Atk. 511, and *Fletcher v. Fletcher*, 2 Cox, 99.

(*h*) See *Legard v. Johnson*, 3 Ves. 361, *Lord St. John v. Lady St. John* 11 Ves. 532, *Wilkes v. Wilkes*, 2 Dick. 791. This last case, according to a MS. note in my possession, was thus : "Where the Feme had a separate Estate, and they agreed upon a separation, and that part of the separate estate standing in Trustees' names shall be given up to the Baron ; the Court would not decree a performance of this Agreement, the Master of the Rolls saying, the agreement amounted to a Divorce, which this Court has no Jurisdiction to decree, and therefore, although it was fully consented to by all parties, he re-

fused to make any Decree. He said it had always been a favourite object of this Court to bring a Husband and Wife to a reconciliation to live together, but that he never knew of a decree to establish a separation ; but he said that he would not dismiss the Bill ; and that if the parties could find any cases to remove his doubts, they might apply again to bring on the cause." No notice is taken of any further proceedings.

(*i*) See *Lord St. John v. Lady St. John*, 11 Ves. 537, and what is said in *Worrall v. Jacob*, 3 Meriv. 268.

(*k*) *Sterling v. Crawley*, 2 Vern. 286. *Stephens and Olive*, 2 Bro. C. C. 90, *Compton against Collinson*. *ibid.* 386 ; and see the observation in *Legard v. Johnson*, 3 Ves. 359 ; and in *Lord and Lady St. John*, 11 Ves. 532. See also *Cooke v. Wiggins*, 10 Ves. 191.

(*l*) *Stephens v. Olive*, 2 Bro. C. C. 90 ; and *King v. Brewer*. cited *ibid.* 93, in note. *Compton v. Collinson*, 2 Bro. C. C. 386. *Worrall v. Jacob*, 3 Meriv. 269, 270.

(*m*) See the observations in *Legard and Johnson*, 3 Ves. 359, 360.

(*n*) See *Fitzer v. Fitzer*, 2 Atk. 514. *Taylor v. Jones*, 2 Atk. 602 ; and the observations and decision in *Legard v. Johnson*, 3 Ves. 361.

to the Bankrupt Laws at the time of a Deed of Separation, in which he covenants *with a Trustee* for the Wife, in consideration of being indemnified from all debts and engagements which may be contracted by her during the Separation, to release his Remainder in Fee in certain Estates (of which he was Tenant for Life, with Remainder to the Wife for Life, &c. with Remainder to himself in Fee) to such uses, &c. as the Wife should by Deed or Will appoint, such Agreement was held good, notwithstanding the 1 Jac. I, c. 15. s. 5 (o). The *Wife* is not bound in any degree by a Deed of Separation; and a specific Performance could not be enforced as against her (p); and it must be observed, that Articles of Separation are put an end to by Reconciliation (q).

A *parol Agreement* for an equality of partition, entered into *389] between persons who had a right to *contract, and accordingly put in execution, will, though of long standing, be established. And if a Joint-tenant upon equality of partition thinks proper to accept of a contingent, uncertain advantage, where one moiety of the Land is of superior value to the other, it will not vacate the Agreement (s); but the Agreement of the Husband will not bind the Inheritance of his Wife (t).

The specific performance of Covenants is frequently sought in Equity. Covenants which are said to *run with the Land* will be decreed to be specifically performed for, or against, (as the case may be) successive owners of such Land (u).

The Court will not give a specific Performance according to the Letter of the Covenant, where there has been a change of circumstances; but, it seems, in such case, it will execute the Covenant according to a conscientious modification of it, to do justice as circumstances will permit (x).

If one agrees to sell Lands he has not, and afterwards acquires them, he will be compelled to perform his agreement (y); as, where a Purchaser of Crown Lands in the time of the *Rebellion* (or as the Reporter, *Serj. Maynard*, terms it, "*the late War*,") sold part to the Plaintiff, and covenanted to make further Assurances; and on the King's Restoration he had a Lease for years made to him under the King's title, he was decreed to assign his Term in the part he had sold (z).

*390] *Where a person *seised of Lands* agrees by Articles to settle Lands of a certain value, the articles have been held to

(o) *Worrall v. Jacob*, 3 Meriv. 256.

Edw. 4, 4b.

(p) See *Lord St. John v. Lady St. John*, 11 Ves. 533. 537.

(u) 1 Eq. Cas. Abr. 473.

(q) *Ibid.* 537. *Fletcher v. Fletcher*, 2 Cox, 99. S. C. 3 Bro. 619.

(x) *Davis v. Hone*, 2 Sch. & Lefr. 348.

(s) *Ireland v. Rittle*, 1 Atk. 642.

(y) *Clayton v. Duke of Newcastle*, 2 Cha. Cas. 112.

(t) *Ibid.* Sed. vid. Co. Litt. 171. a. 8

(z) *Taylor v. Daffar*, 2 Cha. Cas. 212.

be a lien on the Lands, of which such person was then seised, though no particular Lands were mentioned in the Articles (y).

So, where Tenant for Life, with power to make a Jointure of 500*l.*, in consideration of Marriage, and of 10,000*l.*, covenants to make such Jointure, but dies without doing it, it has been held that the Articles are a *lien* on the Estate, and that by the execution of them the Covenantor became a Trustee for the Feme (z).

Where a Husband is bound by his Covenant, or his Trustees are bound with his consent, and with his Money, to purchase and settle Lands, and he does purchase Lands of *less* (a), *equal* (b), or *greater* (c) value than the Sum he covenanted to lay out, but does not settle them, he is (unless the Land be *Copyhold* (d), presumed to have made the Purchase for the purpose of the Settlement (e); for it is a Rule, that where a Man is bound to do an Act, and he does what may enable him to do the Act, it is taken to have been done by him with the view of doing that which he was bound to do (f).

*The reason why it is held a satisfaction in these cases, [*391 seems to be, that the Court will not draw out of the Personal Estate, to the prejudice of the Widow and Younger Children, a Sum of Money which would be a double Provision for the eldest Son (g).

These cases of satisfaction, however, depend upon the intent of the Party, and Evidence is admissible to show, that a Purchase was not made in performance, or part-performance of the Covenant (h). If the Purchaser sells or mortgages the Lands, it will be considered as Evidence that they were not meant to be in satisfaction of the Covenant (i); but a *Devise* will not have such construction (k).

The Cases do not sufficiently distinguish between a *satisfaction* and the *performance* of a Covenant. Satisfaction may exist without an Intent, but performance must always be the result of an Intent (l).

(y) Roundell v. Breary, 2 Vern. 482. confirmed, 3 Atk. 327, 9. Coventry v. Coventry, Gilb. 168.

(z) Lady v. Lord Coventry, 2 Mod. 19.

(a) See 2 Atk. 635. Lechmere and Carlisle, 3 P. Wms. 228.

(b) Wilcox v. Wilcox, 2 Vern. 558, relied on 2 Atk. 634. Deacon v. Smith, 3 Atk. 323.

(c) See Garthshore v. Chalie, 10 Ves. 9.

(d) Attorney-General and Whorewood, 1 Ves. 541.

(e) Lench v. Lench, 10 Ves. 516; see also Wilson and Foreman, imperfectly reported in 2 Dick. 593, but stated

from the Register's Book, 10 Ves. 519, 520. Lechmere and Lechmere, For. 80.

(f) Sowden v. Sowden, 1 Bro. C. C. 583, S. C. mentioned in note, 3 P. Wms. 228; and see 1 Cox, 165. Lechmere and Lechmere, Forest 60, in which report there is a mistake, see 1 Cox, 166. Weyland v. Weyland, 2 Atk. 634.

(g) See Lee and Cox, 3 Atk. 421.

(h) Garthshore v. Chalie, 10 Ves. 10.

(i) Deacon v. Smith, 3 Atk. 326.

(k) Tooke v. Hastings, 2 Vern. 97.

(l) See the distinction taken by the Master of the Rolls in Goldsmid v. Goldsmid, 1 Swanst. 219.

If there be a Covenant on Marriage to settle specific Lands, this Covenant is not satisfied by suffering other Lands of equal value to descend (*m*).

If by Articles, previous to the Marriage, a Husband covenants to leave the Wife, by Deed or Will, 1,000*l.*, and the Husband dies intestate, and the Wife's *distributive share* of the personal Estate is of a value equal to, or exceeding 1,000*l.*, it is a *satisfaction* *392] of the Covenant (*n*). It is the same where a Widow takes under a *quasi* Intestacy (*o*).

It would have been otherwise decided, it seems, in these cases, if the Debt arose in the Husband's Life-time, as, if he covenanted to pay a sum within two years after Marriage, and lived the two years, and died (*p*). And an *orphanage share*, it has been held, is not a satisfaction of a Covenant, because not in the Father's power (*q*).

In one case it was held, that if there be a Contract to settle a particular Estate, and there is a breach of the Contract, it is a question of damages, and an Issue must be directed to try what the damages are ; in which it was said to differ from a Contract to purchase Lands, in which case Lands would be decreed to be purchased (*r*) ; but previous Cases appear to have established it as the doctrine of the Court, that, though a Covenant to settle or convey particular Lands, would not, at Law, create a Lien upon the Lands ; yet, in Equity, such a Covenant, if for a valuable consideration, would be deemed a specific Lien on the Lands, and a performance of the Covenant decreed against all persons claiming under the Covenantor, except Purchasers for a valuable *393] consideration, and without notice of such Covenant (*s*).

If one covenants before Marriage to settle certain Lands on his Wife for life, and afterwards devises such Lands for the payment of Debts, the Covenant operates as a specific Lien on the Lands. But a Covenant to settle Lands of the value of 60*l.* a year, without mentioning any particular Lands, does not operate as a specific Lien, but the Wife must come in as a Creditor in general, and the Master will value her Estate for life, and she will be allowed to the amount of that valuation (*t*).

Where a Husband covenants that Lands settled are of such an annual value, this amounts to a Covenant on his part to settle

(*m*) Trevor v. Trevor, Dom. Proc. 5 Feb. 1719, mentioned in Lord Harcourt's MS. Tables.

(*n*) Lee v. D'Aranda, 1 Ves. 1, S. C. 3 Atk. 419. See also Prime v. Stebbing, 2 Ves. 411. Blandy v. Widmore, 2 Vern. 709. S. C. more full, 1 P. Wms. 324. Garthshore v. Charlie, 10 Ves. 1 S. C. MS. Goldsmid v. Goldsmid, 1 Swanst. 217. S. C. 1 Wils. C. C. 140.

(*o*) Goldsmid v. Goldsmid, 1 Swanst. 211. S. C. 1 Wils. C. C. 140.

(*p*) Oliver v. Brighthouse, mentioned in

1 Ves. 1.

(*q*) Case on Mrs. Parson's Will, mentioned 1 Ves. 1.

(*r*) Wade v. Paget, 1 Bro. C. C. 369; and see Vernon v. Vernon, 2 P. Wms. 594.

(*s*) Finch v. Earl of Winchelsea, 1 P. Wms. 282. Freemoult v. Dedire, 1 P. Wms. 429. Coventry v. Coventry, Gilb. Rep. 160, and at end of Francis's Max. cited 1 Fonbl. Eq. 359, n. (d.)

(*t*) Freemoult v. Dedire, 1 P. Wms. 429.

and make good to that extent, in case of deficiency; but the value must be calculated at the time of the Settlement, and not at the death of the Husband (u).

If a Husband covenants to settle on the eldest Son of the Marriage, and lets Land descend to him in Fee, this is, so far, a performance of his Covenant (x). It is the same where Lands descend to an Heir at Law, who claims, in place of his Ancestor, a sum of Money to be laid out in Land (y).

All these cases of implied satisfaction, or presumed performance, are where the Husband or Father has done nothing, as in the suffering Land to descend, *without any declaration [*394 what way he intended they should go. But where a Will is made, and a clear intention discernible, the construction must be according to the Will (z).

So where parties enter into an Agreement as to the produce of Land, the Land itself will be affected by the Agreement.—Where, therefore, there was a Covenant to appropriate one-third of the produce of a Real Estate to raise a sum of Money, it was considered not merely as a personal Covenant suable at Law, but as creating a Lien upon the Land, and the Covenantees entitled to have it specifically performed (a). (1)

If a sum of Money, say 500*l.* be covenanted to be laid out in Freehold and Leasehold Property, and the Covenantor dies, it might be a question, no where, it seems, decided, between the Heir and Personal Representative, *how much* of the Money is to be considered as Freehold Property descendible to the Heir, and how much as Leasehold, belonging to the Personal Representative; but if in such case the Covenantor by his Will makes a general Devise of all his Freehold and Leasehold Lands and Hereditaments, this would pass the 500*l.* (b).

It is observable, that where Money is agreed or directed to be laid out in Land, to be settled to particular uses, it will, whilst uninvested, be considered as Land in regard to succession, and go to the *Heir* of the person entitled to the Inheritance in the Land to *be purchased, in the same manner as the Land, [*395 if purchased, would have done (c); until some person competent to dispose of the Lands under the limitation of the uses, shall clearly manifest and decide his intention to terminate the

(u) *Speake v. Speake*, 1 Vern. 217.

(x) See dict. 5 Ves. 411.

(y) *Ibid.*

(z) See *Prime v. Stebbing*, 2 Ves.

411.

(a) *Legard v. Hodges*, 3 Bro. C. C.

and 8. C. on rehearing, 4 Bro. C. C. 421.

(b) See *Guidot v. Guidot*, 3 Atk.

254.

(c) See Attorney-General and Milner,

3 Atk. 114.

(1) A court of chancery may decree a specific performance of a general covenant of indemnity, though it sound only in damages. *Champion v. Brown*, 6 Johns. Ch. Rep. 398.

realizing Trust, and to dispose of, or have the uninvested fund again considered as mere personal Property (*d*).

And where a sum of Money is given by Will and directed to be laid out in the purchase of Lands, or of Lands in a particular county, and after they are bought, to be settled upon such and such Persons; if a Bill is filed, the Course of the Court is, to direct a purchase, and the produce of the Money to go as the Land itself, until purchased (*e*). So if there be a direction by Will to purchase a particular Estate, which is swallowed up by an Inundation, as happened in Essex: or if the direction is to purchase an Estate in such a county, and it cannot be procured, the Money will not go to the Executors, but in such manner as the Rents and Profits would do where the Land is purchased (*f*).

And where Money is agreed by articles to be laid out in Land, the Party who would have the sole Interest in the Land when bought, may elect to have the Money paid to him, and that it shall not be laid out in Land (*g*). And it is the same in case of a *Bequest* of Money to be laid out (*h*).

*396] *A very small circumstance, a very slight declaration, will take from Money the quality of Land, but it is not competent to an Infant to make that election; and in that case the property will remain as it was (*i*).

A wife is examined apart from her Husband as to the disposition of Money devised to be laid out in Land for her and her Heirs (*k*), or for her in Tail, with the Reversion to her in fee, whether she would receive the Money, or have it laid out in Land. If she elects to take it in Money, an inquiry is directed, whether she has a Settlement (*l*).

And where Money is to be Laid out in Land, to be settled on one for Life, with Remainder in Tail, the Court will pay out the Money upon the application of the Tenant for Life and the Tenant in Tail (*m*), provided they are not Infants (*n*); but the Wife of the Tenant in Tail, as she would be entitled to Dower out of the Land, if the Money were laid out, must give her consent (*o*). If, however, the Estate to be purchased was to be settled on *A.* for Life, Remainder to *B.* in Tail, Remainder to *C.* in fee, the Money was not directed to be paid on an application by *A.* and *B.* because of the contingency to *C.* but if the

(*d*) *Pulteney v. Darlington*, 7 Bro. P. C. 548. Toml. Ed.; and see *Earlom v. Saunders*, Ambl. 242. *Bradish v. Gee*, Ambl. 229.

(*e*) *Earl of Coventry v. Coventry*, 2 Atk. 396. S. C. best reported at the end of Francis's Maxims in Eq.

(*f*) 2 Atk. 369; and see 10 Ves. 610.

(*g*) *Benson v. Benson*, 1 P. Wms. 130.

(*h*) *Seeley v. Jago*, 1 P. Wms. 389.

(*i*) *Van v. Barnett*, 19 Ves. 109.

(*k*) *Pearson v. Brereton*, 3 Atk. 71.

(*l*) *Binford v. Bowden*, 1 Ves. jun. 512; and see *Oldham v. Hughes*, 2 Atk. 453. *Trafford v. Boehm*, 3 Atk. 447. *Cunningham v. Moody*, 1 Ves. 176.

(*m*) *Amler v. Amler*, 3 Ves. 587.

(*n*) *Carr against Ellison*, 2 Bro. C. C. 56. 1 P. Wms. 90, 130, and 389; and see *Forester*, 272.

(*o*) See note G. to *Eyre's case*, 3 P. Wms. 14.

Remainder was to *B.* in fee, or to *A.* in Tail, Remainder to him in fee, then on such application the *Money was paid (*p*), [*397 as it was also where those in Remainder consented (*q*).

The old rule was to decree the Money to one who would be Tenant in Tail, if laid out in Lands, with remainders over; but *Lord Couper* altered that doctrine (*r*), and held, that the Remainder-man should have his chance, as he could not be barred but by Recovery, which required time, and would not direct it to be paid in Money; and the accident, of the death of the Tenant in Tail in that case, before a Recovery, showed the Remainder-man's interest in so glaring a light that it established the precedent (*s*). But where the Remainder could be barred by *Fine*, the Court decreed the Money (*t*).

And now, by the Statute (39 and 40 Geo. 3. c. 65,) it is not necessary to have such Money actually invested in Land in order to bar the Estate Tail and Remainders over; but upon the Petition of the first Tenant in Tail, and of the owner of the antecedent particular Estate, if any (*u*), in the Lands, Courts of Equity may order Money subject to such Trusts to be paid to the Petitioners. But if it be a doubtful question what Estate the Party is entitled to, the Court will not decide it upon an *ex parte* Petition under this Act (*x*). And before an Order can be obtained under the Act, the Court takes care to see, by a Reference to the Master for that purpose (*y*), *that the *Fund* [*398 is clear; and a Petition will not be heard on the last day of Term; but to obtain the Order in Term, the application must be made at such a period of the Term as would have given sufficient time for a Recovery to be suffered (*z*). If the application is made in the Vacation, the Money is ordered to be paid to the Party, in case he should be living, on the second day of the ensuing Term (*a*).

A Covenant to *renew a Lease*, at the request of the Lessee, within the Term, will be enforced, even in favour of the Executor of the Lessee who died before any request made (*b*).

A clear Contract for the *perpetual Renewal* of a Lease for *Lives* (*c*), or for *Years*, will be specifically executed; but a Covenant at the expiration of one Lease for twenty-one years, to make a new Lease, "with all Covenants, Grants, and Articles, as in the former Lease contained," will not be allowed to

(*p*) *Short v. Wood*, 1 P. Wms. 470.
Trafford v. Boehm, 3 Atk. 447

(*q*) *Collet v. Collet*, 1 Atk. 12.

(*r*) See *Colwall v. Shadwell*, 1 P. Wms. 471. 485.

(*s*) 1 Ves. 176.

(*t*) *Ibid.*

(*u*) In such case there must be two petitions: *Baynes v. Baynes*, 9 Ves. 462.

(*x*) *Ex parte Sterne*, 6 Ves. 156, approved *ex parte Rees*, 3 Ves. & Bea. 11.

(*y*) *Ex parte Hodges*, 6 Ves. 576.

(*z*) *Ex parte Frith*, 8 Ves. 609.

(*a*) *Ex parte Bennet*, *ex parte Dolman*, 6 Ves. 116, and *vid. note to Fletcher v. Tollet*, 5 Ves. 12, in note.

(*b*) *Hyde v. Skinner*, 2 P. Wms. 196.

(*c*) *Furnival and Crew*, 3 Atk. 83.

operate as a Covenant for perpetual Renewal (*d*); unless there are additional words clearly importing that a perpetual Interest is intended (*e*).

It has been holden, that upon a Bill for the specific performance of an Agreement for a Lease, the Court cannot apportion the price according to the time already expired (*f*); but it appears that where the Vendor of a Lease has continued in possession, and in consequence of a Suit, time has elapsed, Interest will be ordered to be paid by the Purchaser, on his Purchase-money; and Rent, in respect of his Possession, by the Vendor (*g*).

When a Person undertakes to do a thing which he can himself do, or has the means of making others do, the Court compels him to do it, or procure it to be done (*h*). It has been determined, that a Man may be decreed to procure his Wife to acknowledge a fine of mortgaged Lands (*i*); or to procure his Wife to join in a surrender of Copyhold; and with this doctrine recent cases agree (*k*). And if a Feme Covert agrees to join with her Husband in making a Surrender, or in levying a Fine, and he dies before it is done, a Court of Equity will compel her to perform the Agreement (*l*), her conscience being bound.

So if a Husband possessed in right of his Wife of a term of years, agree with another for an under Lease, but dies before the Lease is executed, the Agreement will yet be specifically performed against the Wife (*m*).

*400] *If a Husband covenanting for his Wife, states an absolute impossibility to perform his Covenant, and offers to put the Party in the same situation as if the Agreement had never taken place, the Agreement, it seems, would not be enforced (*n*).

In one case, the Husband was decreed to join in a Conveyance, and procure his Wife so to do; and to induce him, an alternative was added, viz. that if he did not, in the time and manner directed by the Master, perform it, he should account

(*d*) Moore v. Foley, 6 Ves. 232. Ig-gulden v. May, 9 Ves. 325; and see 3d vol. Hargrave's Jurisconsult Exercitationes, 178, on the subject of this case. Bridges v. Hitchcock, 1 Bro. P. C. 522. Bettesworth against Dean of St. Paul's, 3 Bro. P. C. 389. Somerville v. Chapman, 1 Bro. C. C. 63. Tritton against Foote, 2 Bro. C. C. 636. S. C. 2 Cox. 174. Russell v. Darwin, mentioned in note to 2 Bro. C. C. 639; see also Harnett v. Yielding, 2 Sch. & Lefr. 556.

(*e*) Ibid. 557.

(*f*) King v. Wightman, 1 Anstr. 80.

(*g*) Dyer v. Hargrave, 10 Ves. 505.

(*h*) Costigan v. Hastler, 2 Sch. & Lefr. 166.

(*i*) Rust v. Whittle, Tot. 94, and Griffin v. Taylor, ib. 106.

(*k*) Morris v. Stephenson, 7 Ves. 474; and see Hall v. Hardy, 3 P. Wms. 187, and Barrington v. Horne, 2 Eq. Abr. 17. Pl. 7. 5 Vin. 547, the case of a Fine agreed to be procured; see also Berry v. Wade, Finch. p. 180, and Outram v. Browne, MS.

(*l*) Baker v. Child, 2 Vern. 61. Sed vid. what is said of that case, Eq. Cas. Abr. 62. pl. 2.

(*m*) Steed against Cragh, 9 Mod. 43. Druce v. Dennison, 6 Ves. 394, 5.

(*n*) See Outread v. Round, 4 Vin. Abr. 203. pl. 4. Morris v. Stephenson, 7 Ves. 478.

to the Plaintiff for the Money received in respect to the Agreement (o).

It seems, however, very doubtful, whether under a Contract by a Husband alone to sell the Estate of his Wife, the Court would decree him to procure her to join (p). *Lord Cowper* refused to enforce a specific performance of a Covenant by a Husband, that his Wife should levy a Fine (q).

In one case it is laid down, that if a Husband agrees by Articles under his hand to convey his Wife's Lands to B., B. may prefer his Bill against the Husband and Wife to compel a specific execution of this Agreement, and if the Wife upon private examination consents, the Court will decree it; but it was doubted whether the Court would decree a specific performance, if the Bill be preferred against the Husband only, because, if the Court should compel the Husband to convey, the Husband would compel the Wife, who is under his power; and the Wife ought not by *Law to convey by means of any compulsion from the Husband (r).

If a Husband covenants to settle all his real and personal Estate on his Wife, and the Heirs of her body by him begotten, and obliges to give each of her Children by him begotten, 1,000*l.* a-piece at twenty-one, and to divide the residue equally among them at her death, this gives an Estate for Life only to the Wife, with Remainder in Fee to the Children as Tenants in common; and the property of the Testator is so tied up, that a real Estate purchased by him in his Life-time, with part of his personal Estate, will be considered as personal Estate, and be disposed of accordingly (s).

It has been held, that if one Party performs his part of an Award, the Court of Chancery may compel the other Party to perform his, though the Award was not made originally by the direction of that Court (t). That a Bill will lie for the specific performance of an Award is clear (u); and this, though the Award be unreasonable, the Arbitrator being a judge of the Party's choosing, and the Award being considered as ascertaining the terms of a previous Agreement. But though if the Award directs any thing to be done respecting Lands, the Court, it seems, will decree a specific performance of the Award; it will not execute an Award for the payment of Money.

(o) See *Sedgwick v. Hargrave*, 2 Ves. 57.

(p) *Gilbert's Lex Prætoria*, 245. *Emery v. Wase*, 5 Ves. 848. S. C. on Appeal, 8 Ves. 848.

(q) *Outread v. Round*, Vin. Abr. tit. "Baron and Feme," (H. b.) Ca. 4. S. C. 2 Eq. Abr. 145.

(r) See *Wheeler and Newton*, Gilb.

Eq. Rep. 245. S. C. Prec. Ch. 16 Gilb. *Lex Prætoria*, MS; and see *Davis v. Jones*, 1 Few Rep. 267.

(s) *Lowther v. Earl of Westmoreland*, 1 Cox, 65.

(t) *Bishop v. Bishop*, 1 Cha. Rep. 142.

(u) *Wood v. Griffith*, 1 Swanst. 43. S. C. 1 Wils. C. C. 44.

***402]** *Having considered those cases in which a specific performance is decreed, we may now proceed to notice those instances in which *a specific performance has been refused*.

The Court will not decree a specific performance of Contracts of every description. It is only where the Party wants the thing *in specie* (y), and where the legal remedy is *inadequate or defective*, that a Court of Equity interferes (z).

A *Parol Agreement* concerning *personal Estate* to any extent, if reasonable and proved, is binding, and may be discharged by Parol (a); but, in general, a Bill will not lie for a specific performance of Contracts *for Chattels* (1), or which relate to *Merchandise*; as a Bargain for Corn (b), or for Stock; for damages in these cases may, with equal advantage, be recovered in an Action, and corn or Stock bought (c). Such cases therefore are left to be decided at law (d). *Sir Joseph Jekyl* decreed a specific performance in the case of a Chattel (e); but *Lord Macclesfield* reversed his Decree, and from that time the Rule of the Court has been not to entertain such a Bill (f). Cases of Contracts for the purchase of Lands, or things that relate to Reality, are of a permanent nature, and if a person agrees to purchase them, ***403]** it is on a particular **liking* to the Land, and is quite a different thing from matters in the way of Trade. But notwithstanding this general distinction between personal Contracts for Goods, and Contracts for Lands, there are cases where persons may enforce a specific performance of Agreements relating to Personalty (g); but the Court will weigh with great nicety cases of this kind (h): as where there were articles for the Sale of 800 tons of Iron, to be paid for by Instalments, in a certain number of years, a specific performance was decreed (i). So, where a Man contracts for the purchase of a great quantity of Timber, as a Ship Carpenter, by reason of the vicinity of the Timber, and where a Man wanting to clear his Land agrees to sell his Timber, in order to apply the Land to a particular sort of Husbandry; in such cases, as nothing could answer the jus-

(y) *Errington v. Aynesley*, 2 Bro. C. C. 341.

(z) *Flint v. Brandon*, 8 Ves. 163.

(a) *Gibbons v. Caunt*, 4 Ves. 347, 8, 9.

(b) *Cud and Rutter*, Vin. Abr. tit. "Contract and Agreement," (M.) C. 21. S. C. 1 P. Wms. 570.

(c) See Bunb. 135. *Errington v. Aynesley*, 2 Bro. C. C. 341. *Flint v. Brandon*, 8 Ves. 163. *Nutbrowns v.*

Thornton, 10 Ves. 161; and see *Mason and Armitage*, 13 Ves. 37.

(d) *Buxton v. Lister*, 3 Atk. 383.

(e) In *Cud v. Rutter*, 1 P. Wms. 570.

(f) 3 Atk. 383; and see *Capper v. Harris*, Bunb. 135.

(g) See *Buxton v. Lister*, 3 Atk. 384.

(h) *Ibid.* 385.

(i) *Taylor v. Neville*, mentioned 3 Atk. 384.

(1) Vide *Brown v. Gilliland*, 3 Des. 541. Although, as a general rule, it is well settled, that chancery will not decree specific performance of a contract relating to most kinds of personal chattels; yet, it seems, as to some kinds, exceptions have been made: Thus a bill for a specific performance of a contract of sale at auction, of negro slaves, was sustained. *Ib.*

tion of the case but the performance of the Contract, *in specie*, a specific performance, it seems, would be decreed (*k*).

It has been said (though there are early *dicta* to the contrary) (*l*), that a specific performance of an Agreement *to build* a House will not be decreed (*m*); but *Lord Hardwicke* seems to have thought differently (*n*), and decreed a specific performance of a Covenant *to rebuild* though he would not of a Covenant **to* [**404 repair* (*o*); and *Lord Rosslyn* held, that if on a Covenant to build the transaction is in its nature defined, a specific performance would be decreed; but if it is loose and undefined, and it is not expressed distinctly what the building is, so that the Court could describe it as a subject for the Report of the Master, the Jurisdiction does not apply (*p*).

Common Covenants in a Lease will not be specifically enforced in Equity; the proper remedy being at Law (*q*).

A Bill will not lie for a specific performance of an Agreement (*r*) or a Covenant (*s*) to refer to Arbitration.

Nor will a Bill lie for the specific performance of an Agreement to purchase the business of an Attorney; since, supposing such an Agreement not illegal, it is yet such as a Court of Equity has no means of carrying into execution (*t*).

If an Estate be sold under a Decree, a Bill for a specific performance will not lie, but the Purchaser must proceed under the Decree (*u*).

A Party calling for the aid of a Court of Equity, must come, as it is said, with clean hands (*x*); it being a maxim of Equity, that "*He that hath committed Iniquity shall not have Equity* (*y*)."
A Defendant, **therefore*, to a Bill for a specific perform- [**405* ance of an Agreement is allowed to resist it, by showing that under the circumstances the Plaintiff is not entitled to the prayer of his Bill; as by evincing that there has been an *Omission*, or

(*k*) See *Buxton v. Lister*, 3 Atk. 395. That an Agreement for the Sale of Timber need not be in writing, see 1 Lord Raym. 182; but see *Crosby and Wadsworth*, 6 East, 602, and also 11 East, 362.

(*l*) See ante, p. 361.

(*m*) See *Lucas against Cummerford*, 3 Bro. C. C. 167. S. C. 1 Ves. jun. 236. *Errington against Aynesley*, 2 Bro. C. C. 343. *Flint v. Brandon*, 8 Ves. 164. *Wilkins v. Fry*, 1 Meriv. 264; but see contra, *Holt v. Holt*, 2 Vern. 322, and dict. 1 Ves. 461.

(*n*) *City of London v. Nash*, 3 Atk. 515.

(*o*) *City of London v. Nash*, 1 Ves. 12. S. C. 3 Atk. 512; and see *Mosely*

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v. Virgin, 3 Ves. 185, and *Flint v. Brandon*, 8 Ves. 164. *Hill and Barclay*, 16 Ves. 402, and as to covenant to repair; and see *Whisler and Mainwaring*, mentioned 3 Wood. Lect. 464, in note (*z*.)

(*p*) *Moseley v. Virgin*, 3 Ves. 185.

(*q*) *Rayner v. Stone*, 2 Eden, 128.

(*r*) *Street v. Rigby*, 6 Ves. 818. *Re-desd. Tr. Pl.* 214, 3d edit.

(*s*) Sic dict. per Lord Eldon, in *Tattersal v. Groote*, 2 Bos. & Pull. 135. *Wellington v. Mackintosh*, 2 Atk. 569.

(*t*) *Bozon v. Farlow*, 1 Meriv. 459.

(*u*) *Annesley v. Ashurst*, 3 P. Wms. 282.

(*x*) *Cadman v. Horner*, 18 Ves. 11.

(*y*) *Francis's Maxims*, p. 5.

Mistake in the Agreement (y), or that it is *unconscientious (z)*, or *unreasonable (a)*; or *Fraud*, or *Surprise (b)*; or that there has been *Concealment (c)*, *Misrepresentation (d)*, (whether wilful or not, latent or patent) (*e*) or any *unfairness (f)*, (intoxication, for instance) (*g*), attending it: and in these cases parol Evidence of such circumstances of defence is permitted; for though parol *406] Evidence is inadmissible on the part of a *Plaintiff*, to explain, add to, or vary a written Contract (*h*), (except in cases of *Fraud*) (*i*), it is admissible, on the part of a *Defendant* to a Bill for a specific performance, to show circumstances, *dehors*, independent of the Writing, making it inequitable to interpose for the purpose of a specific performance (*k*). (1)

Where, therefore, on the face of the Agreement, a specific sum was to be given for Timber, but it was shown by parol Evi-

(y) *Joynes v. Statham*, 3 Atk. 388. *Woolham v. Hearn*, 7 Ves. 211; see 1 Ves. & Bea. 532. *Mason v. Armitage*, 13 Ves. 25. *Costigan v. Hastler*, 2 Sch. & Lefr. 166; and see *Howel v. George*, 1 Madd. Rep. 11. *Flood v. Finlay*, 2 Ball & Bea. 33.

(z) *Vaughan against Thomas*, 1 Bro. C. C. 556.

(a) *Green v. Green*, 25 Jan. 1710, Dom. Proc. *Thompson v. Harecourt*, Dom. Proc. 13 February 1721. *Moody v. Stewart*, Dom. Proc. 28 February 1728. *Brain v. Wooley*, 9 Feb. 1721. Dom. Proc. *Carrol v. Chamberlyn*, Dom. Proc. 14 July 1721. *Tap v. Stanhope*, Dom. Proc. 24 March 1720; and see *Costigan v. Hastler*, 2 Sch. & Lefr. 166. *Fain v. Browne*, 2 Ves. 307, and note (2) to *Howel v. George*, 1 Madd. Rep. p. 11. *Revell v. Hussey*, 2 Ball & Bea. 287.

(b) *Conway v. Shrumpton*, 19 Jan. 1710. Dom. Proc. noticed in Lord Harcourt's MS. Tables. *Clowes v. Higginson*, 1 Ves. & Bea. 526, 7. *Marquis Townshend v. Stangroom*, 6 Ves. 328. *Twining v. Morrice*, 2 Bro. C. C. 326, alluded to in *Mortlock v. Buller*, 10 Ves. 305; and see 2 Ball & Bea. 33.

(c) *Shirley v. Stratton*, 1 Bro. C. C. 440. *Oldfield v. Round*, 5 Ves. 508.

(d) *Cadman v. Horner*, 18 Ves. 11. *Buxton v. Lister*, 3 Atk. 386. *Phillips v. Duke of Bucks*, 1 Vern. 227. *Howard v. Hopkins*, 2 Atk. 370. The doctrine as to Misrepresentation is well con-

sidered in *Lowndes v. Lane*, 2 Cox, 363.

(e) *Wall v. Stubbs*, 1 Madd. Rep. 81. 1 Camp. 337.

(f) *Savage v. Taylor*, For. 234; and see *Child v. Danbridge*, 2 Vern. 71. *Scott v. Murray*, 1 Ves. 2.

(g) *Cragg v. Holme*, mentioned in note to *Cooke v. Clayworth*, 18 Ves. 14. and approved (*ibid.*) p. 15; and see *ante*, p. 301, &c.

(h) *Ramsbottom v. Gosden*, 1 Ves. & Bea. 165; and see what is said in *Butler v. Cooke*, 1 Sch. & Lefr. 39; and *Meeres v. Ansell*, 3 Wils. 275. *Penn v. Lord Baltimore*, 1 Ves. 451. *Baker v. Payne*, 1 Ves. 456. *Wollam v. Hearn*, 7 Ves. 211, 219. *Robson v. Collins*, 7 Ves. 130. *Marquis Townshend v. Stangroom*, 6 Ves. 328. *Rich and Jackson*, 4 Bro. C. C. 514. Judgment more fully given in 6 Ves. 336. *Coles and Trecothick*, 9 Ves. 246. *Winch v. Winchester*, 1 Ves. & Bea. 375. *Clowes and Higginson*, 1 Ves. & Bea. 526, 7. *Davis v. Symonds*, 1 Cox, 403. In *Stokes v. Moore*, 1 Cox, 221, the Court appear to have been of opinion, that Parol Evidence is admissible on the part of a Plaintiff in explanation of a written agreement, where such explanation related only to the Repairs of a House; and see *Ogilvie v. Foljambe*, 3 Meriv. 53.

(i) *Baker v. Paine*, 1 Ves. 456. *Pember v. Mathers*, 1 Bro. C. C. 52.

(k) *Davis v. Symonds*, 1 Cox, 402.

(1) And where the conduct of the purchaser of real estate, does not amount to actual fraud, yet if it be such, under the circumstances, as to render the contract unfair or unreasonable, chancery will not decree a specific performance. As where the inadequacy of price was very great; and the vendor was a young man, just of age, and ignorant of the real value of the land, and acted hastily on being urged. *Clitherall v. Ogilvie*, 1 Des. 250.

dence that the Defendants were induced to give that sum upon an untrue representation that it was valued by two Timber Merchants, it was not enforced (*l*). So, where an Agreement was to pay so much Rent, but by the Evidence it appeared the Defendant was induced so to agree because she thought, from the Plaintiff's false representation, it was the rent he paid, a specific performance was refused (*m*). So, in a case where the Defendant proved that at the time the Agreement was executed there was a parol Agreement by the Plaintiff, upon the faith of which the Defendant executed, which parol Agreement had *been unperformed, a specific performance in favour of [*407 the Plaintiff was refused (*n*).

Where an Agreement has been unfairly obtained, and the Party has been in possession, and made lasting Improvements, he has been allowed for them on consenting to deliver up the Agreement, and account for the Profits, but not if he goes to Law and fails there (*o*).

In the case of *Articles*, if they appear unreasonable, or if even *some parts* of them appear unreasonable (*p*), or founded in fraud, or it would be unjust or unconscionable to give assistance, a Court of Equity will not enforce them (*q*). So if an Heir sells a Reversion in the Life of his Father, at an under value, the Court will not in favour of such a Purchaser decree a specific performance of a Covenant for further Assurance (*r*).

An Agreement may be resisted on the ground of a *parol waiver* (*s*), (*1*) or a waiver by *acts* of the Parties (*t*), though at common Law an obligation, or other matter in Writing could not be discharged by parol (*u*); but the proof must be very clear (*x*). If variations in an Agreement by Parol be so acted *upon [*408 that the original Agreement cannot be enforced without injury to one party, that circumstance would be a bar to a specific performance of such original Agreement (*y*); but variations verbally agreed upon are not sufficient to prevent the execution of a written Agreement, if the situation of the Parties in all other respects remain unaltered (*z*).

(*l*) *Buxter v. Lister*, 3 Atk. 383.

(*m*) *Woollam v. Hearn*, 7 Ves.

219.

(*n*) *Clark v. Grant*, 14 Ves. 519.

(*o*) *Savage v. Taylor*, For. 234.

(*p*) See 3 Atk. 190.

(*q*) *Young v. Clerk*, Prac. Chan. 538.

(*r*) *Johnson v. Nott*, 1 Vern. 271.

(*s*) *Goman v. Salisbury*, 1 Vern. 240.

Price v. Dyer, 17 Ves. 356. Legal and Miller, 2 Ves. 299; and see this case cited by the Chancellor, 6 Ves. 336, in note. *Gibbons v. Caunt*, 4 Ves. 848. Sed vide *Woollam and Hearn*, 7

Ves. 211. *Davis v. Symonds*, 1 Cox, 407.

(*t*) *Lady Lanesburgh v. Ockshott*, 2 June, 1719. Dom. Proc. noticed in Lord Harcourt's MS. Tables.

(*u*) 19 E. 4. 1 b.

(*x*) *Buckhouse and Crosby*, 2 Eq. Abr. 33.

(*y*) See the case in 2 Eq. Abr. 48. pl. 16. and in Vin. Abr. Tit. Contract and Agreement, (H.) Ca. 38. and Legal and Miller, 2 Ves. 299.

(*z*) See *Price and Dyer*, 17 Ves. 364.

An Agreement, if impeached, must be so *at the time of its commencement*, nothing *subsequent* can affect it (a); a failure in a speculation forms no ground to resist a specific performance (b). Where an Estate was sold for a specific Sum and an Annuity during the Life of the Vendor, who died before any thing became due in respect of the Annuity, the Agreement was nevertheless executed (c). It is therefore a general rule, that where an equitable Title is complete, a legal Conveyance will be decreed, though the property may be much enhanced or depreciated in value (d). There are, however, cases, where, when the specific performance would be attended with great loss and hardship to the Defendant, the Court has not decreed a specific performance, but has directed an Issue to try what damages the Party has sustained by the nonperformance of the Agreement (e). In *family arrangements* particularly, the Court has held Parties to Agreements which **strangers* would not have been bound by (f). In general, however, the Court will not hold Parties acting upon their rights, doubts arising as to those rights, to be bound, unless they act with full knowledge of all the doubts and difficulties that arise: but if Parties with full knowledge act upon them, though it turns out that one gains a great advantage, yet if the Agreement was fair and reasonable at the time it will be binding (g). It has been held that the Court will enforce such an Agreement, though it turns out that the Parties acting upon a wrong opinion of Council were mistaken in point of law (h).

No Agreement will be enforced that is *illegal* (i); if, for instance, it be found in champetry (k); or made with a view to stifle a prosecution for Felony (l). From one case (m) it would seem if a Vendor entitled only under an Agreement sells to another, such Vendee might object to a specific performance, on the ground of the Statute 32 Henry 8, c. 9 (n); but the most recent decision on this subject appears to establish the validity of such sub-contract (o). An Agreement in fraud of a Power will not be enforced (p). If a Party were compelled to do an **act which he is not lawfully authorized to do*, he would

(a) 1 Atk. 404.

(b) Adams against Weare, 1 Bro. C. C. 569; and see Mortimer v. Capper, 1 Bro. C. C. 156.

(c) 1 Bro. 156; and see 2 Bro. 17, 18.

(d) Revell v. Hussey, 2 Ball & Bea. 287.

(e) City of London v. Nash, 3 Atk. 516.

(f) Stockley v. Stockley, 13 Ves. 31. Stapilton v. Stapilton, 1 Atk. 1.

(g) Ibid. 10. Cann v. Cann, 1 P. Wms. 727, but see Davy v. Barber, 2 Atk. 491, where it is said, that where any extraordinary advantage happens by an accident, it is in the dis-

cretion of the Court to decree a specific performance.

(h) Gibbons v. Caunt, 4 Ves. 849.

(i) Ex parte Dyster, 1 Meriv. 172.

(k) Powell v. Knowler, 2 Atk. 224.

(l) Johnson v. Ogilby, 3 P. Wms. 279.

(m) Thomson v. Thomson, 7 Ves. 463.

(n) Hitchens v. Lander, Coop. 34. In Wall v. Stubbs, 1 Madd. Rep. 80, the point was doubted.

(o) Wood v. Griffith, 1 Swanst. 56, 58.

(p) See Harnett v. Yelding, 2 Sch. & Lefr. 558, 9.

be exposed to an Action for damages at the Suit of the Person injured by such Action; and therefore if a Bill is filed for a specific performance of an Agreement made by a man who appears to have a bad Title, he is not compellable to execute it, unless the party seeking performance is willing to accept such title, as he can give, and that only in cases where an injury would be sustained by the Plaintiff if he were not to get such an execution of the Agreement as the Defendant could give (*p*).

So, an Agreement for the Sale of a Ship, was, under the Ship Registry Act, 26 Geo. 3, c. 60, considered as void in Equity as well as at law, for want of the Certificate of Registry being duly recited in the Memorandum of Sale, although a copy of such Certificate was thereunto annexed; and a Motion founded on such Agreement was refused (*q*).

A specific performance of an Agreement to sell an Estate in Fee, by one who supposed he was absolute Owner of the Estate, when he was only Tenant for Life, under a Settlement, with a proviso empowering him to purchase an Estate in Fee Simple in Possession, in some convenient place or places in England, of equal or better value, and to settle the same on him in lieu of the settled Estate which was then to be his own, has been refused (*r*). In no case, does the Court ever do so fruitless a thing as to decree a specific performance of acts impossible to be done. In such case it leaves the party to his remedy at Law (*s*).

*A specific performance of a Lease has been refused [*411 where the term expired before the hearing of the cause (*t*); but it seems there may be cases, in which, though by inevitable accident, or the accumulation of other business before the Court, the term may have expired before the hearing; yet if in the interval important rights have arisen, the Court would antedate the Lease, and prevent the party availing himself of that circumstance as an objection to any proceeding at Law (*u*).

A specific performance of an Agreement for a Partnership has been refused, as it might be dissolved immediately afterwards (*x*).

(*p*) See *Harnett v. Yielding*, 2 Sch. & Lefr. 554.

(*q*) *Brewster v. Clarke*, 2 Meriv. 75.

(*r*) *Howell v. George*, 1 Madd. Rep. 1.

(*s*) *Green v. Smith*, 1 Atk. 573.

(*t*) *Weston v. Piman*, mentioned in *Nesbit v. Meyer*, 1 Swanst. p. 225, and in 1 Wils. C. C. 98, 99, and the principal case.

(*u*) *Nesbit v. Never*, 1 Wills. C. C. 99.

(*x*) *Herecy v. Birch*, 9 Ves. 357. S. C. MS. but see contra *Buxton v. Lister*, 3 Atk. 385, and *Anon.* 2 Ves. 529. I have reason to believe that Lord Eldon

was not quite satisfied with his decision in *Herecy v. Birch*; and it may be observed, that there are cases where the Court will by injunction inhibit the dissolution of a partnership. See ante. In a Suit in the Court of Exchequer there was an agreement among Partners that in case of the death of either of them they would execute a Deed in favour of the Executor of the Person so dying, so as to constitute him a Partner upon giving his Bond to perform the Articles of Partnership, and upon a Bill filed for a specific performance of this Agreement it was decreed. [*Anon.* 1808, MS.]

An Agreement will not be decreed where the performance of it would be a *breach of Trust* (y), or produce a *Forfeiture* (z).

A *voluntary Conveyance* (unless obtained by imposition (a) or *412] fraud from a person, for instance, of *weak intellects) (b), is good against the party making it, though cancelled (c), and against all subsequent voluntary acts, whether by Deed (d), or Will (e), though the Devise be for the payment of Debts (f); for the Court "will not loose the fetters the Party hath put upon himself; but he must lie down under his own folly (g)." As against Purchasers for a valuable consideration, and in some instances, as to Creditors, it is, (as hath been shown) (h), bad; and if a voluntary settlement is made, and afterwards a Sale is made to a Purchaser, who has notice of the voluntary Conveyance, there is no Equity to apply to the Court to lay out the purchase-money to the same uses as the voluntary Conveyance; not even, though there was an express covenant to lay out the Money to the same uses (i). Nor where a voluntary Conveyance has been made will the Court enjoin the Party from selling (k). But a Settlement, voluntary at first, and therefore bad as against Creditors and Purchasers, may become good afterwards, even as against them: as, where the object of the Settlement sells *413] to another (l); or where a Father settles Lands *on a Daughter, and a Person marries her in confidence of such Settlement, it may be enforced (l). Nor will a Court of Equity assist a Vendor in defeating a prior voluntary Settlement made by himself, by compelling a specific performance at the instance of the Vendor, against the Vendee (m).

With regard to a specific performance of a *voluntary Agreement*, Lord Northington said "he did not recollect a Precedent

(y) *Mortlock v. Buller*, 10 Ves. 292. S. C. MS. *Johnson v. Bentham*, Exchequer, 1808, MS. *Dale v. Lynch*, Dom. Proc. 17 August, 1715, cited in *Grounds and Rudiments of Law and Equity*, 18.

(z) *Brian v. Acton*, 5 Vin. Abr. 533. S. C. Dom. Proc. Feb. 1721.

(a) *Naldred v. Gilham*, 1 P. Wms. 577.

(b) *White v. Small*, 2 Chan. Cas. 103.

(c) Sir J. Jekyl conceived it to be so clear that a voluntary deed once perfected could not be revoked at pleasure; that he established the copy of the first deed, though the original had been destroyed by the maker. See what is said in *Worrall v. Jacob*, 3 Meriv. 271.

(d) 1 Ch. Rep. 173. *Clavering v. Clavering*, 2 Vern. 473. *Worrall v. Jacob*, 3 Meriv. 258. The case of *Nal-*

dred v. Gilham, 1 P. Wms. 579, turned on its own particular circumstances, as observed in *Boughton v. Boughton*, 1 Atk. 625, and in *Worrall v. Jacob*, 3 Meriv. 271; the first Deed was obtained by imposition.

(e) *Villers v. Beaumont*, 1 Vern. 100.

(f) *Bale v. Newton*, 1 Vern. 464.

(g) 1 Vern. 101.

(h) See ante.

(i) *Pulvertoft v. Pulvertoft*, 18 Ves. 93; and see *Buckle v. Mitchell*, 18 Ves. 112, contra. *Leach v. Dean*, 1 Ch. Rep. 78.

(k) *Ibid.* 84.

(l) *George v. Milbank*, 9 Ves. 190; and see 1 Meriv. 638.

(l) *East India Company and Clavell*, Prec. Ch. 379, 380. S. C. *Gilb. Rep.* 37.

(m) *Smith v. Garland*, 2 Meriv. 123.

of the sort (n) ;” but *Lord King* seems to have justly observed, there are precedents both ways (o). There are cases in which it has been held that an Agreement under hand and seal, though voluntary, ought to be specifically decreed (p); and on the other hand it has been solemnly determined that a voluntary Conveyance cannot be enforced (q), (1) the Court never decreeing specifically without a consideration (r). In some of these cases the Court has held that it has a discretionary authority (s). The latter Cases appear to have taken a middle course, and to establish, that a Court of Equity will not interfere against volunteers (t), unless in cases of Fraud (u). *So it will not interfere for volunteers (u); it will not enforce the specific performance of a voluntary Agreement (x) unless in those cases where a specific performance of *Marriage Articles* has been decreed, even in favour of *Collaterals* (y); which however cannot be where there has been a Purchaser subsequent to Articles, or a Settlement; much less will a covenant in a Marriage Settlement in favour of a *Stranger* be enforced in Equity (z).

If, however, a voluntary Deed is sufficient to pass the subject out of the Conveyor, it will be specifically enforced, provided it is supported by a valuable, or at least a meritorious, consideration; such as the payment of Debts (a), or making a Provision for a

(n) *Wycherley v. Wycherley*, 2 Eden, 177.

(o) *Randall v. Randall*, Prec. Ch. 464.

(p) *Beard v. Nutthall*, 1 Vern. 427. Husband and Pollard, mentioned 2 P. Wms. 467. *Wiseman v. Roper*, 1 Ch. Ca. 84. *Frank v. Frank*, ibid; and see *Edwards v. Countess of Warwick*, 2 P. Wms. 176. *Wentworth v. Deverginy*, Prec. Ch. 69; and see what is said in *Tyrrel v. Hope*, 2 Atk. 562.

(q) *Fursacre v. Robinson*, Prec. in Ch. 475; and see *Peacock v. Monk*, 1 Ves. 133, and what is said in *Underwood v. Hitchcox*, 1 Ves. 280. *Griffin v. Nanson*, 4 Ves. 344.

(r) *Penn v. Lord Baltimore*, 1 Ves. 450; and see what is said in *Williamson v. Codrington*, 1 Ves. 514. *Wycherley v. Wycherley*, 2 Eden, 177.

(s) Prec. Chan. 75.

(t) *Coventry v. Coventry*, at end of Francis's Maxims in Eq.

(u) See *Morrice v. Burroughs*, 1 Atk. 401.

(w) *Graham v. Graham*, 1 Ves. jun. 275.

(x) *Stapilton v. Stapilton*, 1 Atk. 10; and see 3 Atk. 399. 18 Ves. 149. *Matthews v. Lee*, 1 Madd. Rep. 563, 564.

(y) *Goring v. Nash*, 3 Atk. 189. see *Osgood and Strode*, 2 P. Wms. 245. *Edwards v. Countess Warwick*, 2 P. Wms. 175. *Pulvertoft v. Pulvertoft*, 18 Ves. 90, 92; and see what is said in *Stephens and Trueman*, 1 Ves. 74. and *Ithell v. Beane*, ibid. p. 216; and the case of *Gregson v. Riddell*, mentioned 4 Ves. 350, and *Hale v. Lamb*, 2 Eden, 292.

(z) *Sutton v. Chetwynd*, 3 Meriv. 249. *Johnson v. Legard*, 3 Madd. Rep. 283.

(a) See vide *Wallwyn v. Coutts*, 3 Meriv. 707.

(1) In *Minturn v. Seymour*, 4 Johns. Ch. Rep. 497, it was resolved, that a mere voluntary agreement, not valid at law, could not be enforced in equity; especially, against a legal claim for a just debt, and where there is no consideration, accident or fraud.

Wife, or Child (b); and where the legal Conveyance is so effectually made, as that Stock is transferred (c), or Lands conveyed (d) to a Trustee, the Court will execute the Agreement as against the *Trustee* and the *Author of the Trust (e)*; unless *415] where the Party *has a right to put an end to it by his own act, under a sole power of Revocation (e).

A Covenant by a Husband to reconvey an Estate settled on him by mistake is not considered as voluntary, but may be enforced (f).

The Court will not enforce the performance of a *voluntary Agreement* for a Lease, the mere result of bounty; but the Court would not disturb a Lease actually made in pursuance of such an Agreement (g).

This Court will not lend its assistance to enforce an Agreement or Contract by a person out of possession to grant a present Lease to a party who is apprised he cannot obtain possession except by a Suit (h).

If there has been *gross laches* in a Plaintiff, a specific performance of an Agreement for the purchase of an Estate will not be decreed.

In a late Case (i), and in some previous Cases, it is said, that in Purchases, time is not essential; but that proposition has been *416] questioned (k); (1) at Law *the time fixed for completing

(b) *Colman v. Sarrel*, 3 Bro. C. C. 14. S. C. 1 Ves. jun. 59. *Ellison v. Ellison*, 6 Ves. 662; and see *Griffin v. Nanson*, 4 Ves. 356. *Pulvertoft v. Pulvertoft*, 18 Ves. 99. *Lechmere v. Earl Carlisle*, 3 P. Wms. 222. 1 Sch. & Lefr. 60.

(c) *Ellison v. Ellison*, 6 Ves. 662; and see *Pulvertoft v. Pulvertoft*, 18 Ves. 99, 100. *Ex parte Pye*, 18 Ves. 149.

(d) *Smith v. French*, 2 Atk. 243.

(e) *Antrobus v. Smith*, 12 Ves. 46. *Sloane v. Cadogan*, Sugd. Vendor and Purchaser, appendix, No. 24, 5 edit. *Sed vide Wallwyn v. Coutts*, 3 Meriv. 707.

(f) *Pulvertoft v. Pulvertoft*, 18 Ves. 99.

(g) *Randal v. Randal*, 2 P. Wms. 464. see *Anon. Prec. Ch.* 101. *Daly*

v. Terynck, 17 August, 1715, Dom. Proc. Lord Harcourt's MS. Tables.

(g) *Willan v. Willan*, 16 Ves. 92.

(h) *Bayley v. Tyrell*, 2 Ball & Bea. 363.

(i) *Lord Ormond v. Anderson*, 2 Ball and Bea. 370.

(k) This doctrine seems in some degree to have arisen out of a misreport of *Gibson v. Patterson*, 1 Atk. p. 12. See 4 Ves. 689, 690. *Radcliffe v. Warrington*, 12 Ves. 326. 1 Ball & Bea. 68; and see *Morgan v. Shaw*, 2 Meriv. 140, where Lord Eldon says, "the inclination of my opinion is against the old doctrine, that time is in no case of the essence of the contract." And see *Levy v. Lindo*, 3 Meriv. 84, and what is said in *Hudson v. Bertram*, 3 Madd. Rep. 447.

(1) Lapse of time merely, is not, in all cases, an objection to decreeing a specific performance of a contract: As where an agreement for the sale of land was suffered to remain unexecuted for fourteen years, the vendee having continued in possession, and paid a part of the purchase money, &c., the court, under the circumstances, decreed a specific performance. *Waters v. Travis*, on appeal, 9 Johns. Rep. 450. *Vide Butler v. O'Hear*, 2 Des. 398.

Yet time may make an essential part of a contract, and on default of the party, at the day, without any just excuse, or any acquiescence or waiver of the other party, a court of chancery will not relieve the negligent party. *Benedict v. Lynch*, 1 Johns. Ch. Rep. 370.

But if time be not of the essence of a contract, it may be dispensed with, in equity. *Hepburn v. Auld*, 5 Cranch, 262.

a Contract must be strictly attended to, and is there considered as a material object in the Contract, or, as the usual expression is, "of the essence of the Contract" (*l*): and though (unfortunately, perhaps) (*m*), time is not so strictly regarded in Equity as at Law, yet, it seems, in general, that it must be considered essential (*n*); and may certainly be made the essence of a Contract (*o*), though there may be cases where it not appearing to be a material object to which the parties looked (*p*), and cases arising out of the Conduct of the Parties (*q*), or inevitable Accident, &c. which may induce the Court to relieve, notwithstanding the time has elapsed within which the Contract was stipulated to be performed.

It was held upwards of a century ago, that where one Party has trifled or shown a backwardness in performing his part of the Agreement, a specific performance would not be decreed in his favour, especially if circumstances were altered (*r*); but afterwards it became a prevailing idea, that where an Agreement was entered into either party might, *at any time*, *obtain a specific performance (*s*). *Lord Kenyon* is said to have been the first who resisted that notion, and *Lord Alvanley* followed his example (*t*), and held, that a Party cannot call upon a Court of Equity for a specific performance unless he has shown himself "ready, desirous, prompt, and eager (*u*)."
If, in particular, there be an Agreement for the Sale of a *Reversion*, and part of the terms, is, that the purchase-money be paid by a certain time, if it is not so paid, by default of the Vendee, the Vendor is discharged from his Contract (*x*); for no man sells a Reversion who is not distressed for Money; and it is ridiculous to talk of making him a compensation by giving him Interest on the purchase-money during the delay (*y*). The same doctrine applies where the Purchase is of a Lease depending on Lives (*z*). But if the Purchaser of a Reversion objects a want of Title, and continues treating after the time is elapsed when a good Title was

(*l*) *Berry v. Young*, 3 Esp. N. P. C. 840, n.

(*m*) See *Wilde v. Fort*, 4 Taunt. 341.

(*n*) *Keen v. Stuckley*, Gilb. Eq. Cas. 155. *Lechmere and Lewis*, Lucas, 503. *Lloyd and Collet*, 4 Bro. C. C. 469, and the judgment in that case in 4 Ves. jun. 689, 690, in note to *Harrington and Wheeler*. *Spurrier and Hancock*, 4 Ves. 674. *Guest and Homfray*, 5 Ves. 818. *Levy v. Lindo*, 3 Meriv. 84.

(*o*) *Sic dict.* by Lord Chancellor in *Peers and others v. —*, 7 Nov. 1810, MS.

(*p*) See *Hearne v. Tenant*, 13 Ves. 289. and *Radcliffe v. Warrington*, 12 Ves. 325. *Lennon v. Napper*, 2 Sch. & Lefr. 685, appendix.

(*q*) See *Seton v. Slade*, 7 Ves. 265.

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Levy v. Lindo, 3 Meriv. 84. *Hudson v. Bertram*, 3 Madd. Rep. 477.

(*r*) *Hayes v. Caryl*, Dom. Proc. 26 Jan. 1702. mentioned in *Grounds and Rudiments of Law and Equity*, p. 18. S. C. mentioned in *Lord Harcourt's MS. Tables*.

(*s*) See 1 Atk. 12; and what is said in *Jones and Price*, 3 Anstr. 924.

(*t*) See *Marquis of Hertford v. Bore*, 5 Ves. 720; and see *Guest v. Homfray*, 5 Ves. 818.

(*u*) See *Milward v. Earl of Thanet*, 5 Ves. 720, in note.

(*x*) *Newman against Rogers*, 4 Bro. C. C. 391.

(*y*) *Ibid.* 393.

(*z*) *Lord Ormond v. Anderson*, 2 Ball & Bea. 370.

to be made, and the purchase completed, and the Title is afterwards made good, he will be held to a specific performance (a).

Where a Contract had long lain dormant (b), thirteen years (c), for instance, a specific performance has been refused; and *418] laches of much less continuance, *is sufficient to dissolve the Contract; for where no step had been taken from the day of the sale, and six months had elapsed after the expiration of the time at which the Contract was to be completed, the conduct of the Vendor was considered as evidence of an abandonment of the Contract (d). (1) So where nothing had been done towards performance of the Agreement, when the Purchaser became a Bankrupt, nor afterwards, until the Premises, by a subsequent event proved to be much more valuable than they were at the time the Contract took place, a specific performance was refused (e). It seems, indeed, that whenever the object of one of the Parties contracting would be defeated by delay in the execution of it, if the other party delay he will not be allowed to insist on performance (f). As, when a Party having entered into a Contract to purchase an Estate, the Estate being sold for the purpose of disencumbering the Vendor, and the Purchaser laid by, though for a year only, Lord Rosslyn refused a specific performance (g).

Resting on the Equitable Estate by a person in possession, without clothing it with a legal Title, has never been held to be that sort of laches which prevents relief (h).

And where one agreed, by Articles upon Marriage, to purchase Lands, and settle them within three years, the Agreement was *419] held not to be waived by *length of time, the Covenantor having been in Trade, and unable, conveniently, to spare Money (i).

If the Vendee on a *Sale by Auction*, calls for his deposit at the end of the time limited for completing the Purchase, and insists he will not go on with the Purchase, the Court will not compel him; but if he acquiesces in the delay, or does not suf-

(a) Britton and others v. Twining 12. and others, before V. C. Leach, 30 June 1818.

(b) Wingfield v. Whaley, Vin. Abr. tit. Contract and Agreement, (L) Ca. 36. S. C. Dom. Proc. 13 March, 1722; and see Moore v. Blake, 1 Ball & Bea. 62.

(c) Clifton v. Taylor, MS.

(d) Lloyd against Collett, 4 Bro. C. C. 469. S. C. stated in note to 1 Atk.

(e) Alley v. Deschamps, 13 Ves. 225.

(f) Crofton v. Ormsby, 2 Sch. & Lefr. 604.

(g) Ibid.

(h) Ibid.

(i) Slaney v. Slaney, 5 May, 1714. Dom. Proc. Lord Harcourt's MS. Tables.

(1) But where there was a delay of three years in making a title to land, it was held not sufficient to release the purchaser from his contract; especially, as it might have compelled the vendor to complete the title by filing a bill for that purpose. *Osborne v. Bremer*, 1 Des. 486.

ficiently declare his dissent, a specific performance will be decreed (k).

If a Plaintiff has failed to perform his part of an Agreement, (1) or if it has become impossible to perform it, he cannot insist on a specific performance (l); (2) but if he has performed so much of his part of the Agreement, that he cannot be put in *statu quo*, and is no default for not performing the residue (m), or is prevented from completing it by the default of the Defendant (n), he is entitled to a specific performance.

There is, however, a difference between *Agreements on Marriage* being carried into execution and other Agreements; for all other Agreements are considered as entire, and if either of the Parties fail in the performance of the Agreement, it cannot, at the instance of such Party, be decreed in specie, but must be left to an Action at Law; but in *Marriage Agreements* it is otherwise, for though either the relations *of the Husband or [*420 Wife should fail in the performance of their part, yet the Chil-

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| (k) Pincke against Curteis, 4 Bro. C. C. 329. Jones and Price, 3 Anstr. 924. | Prætoria, MS. | (m) Meredith and Wynn, 2 Ch. Cas. 18, 19. S. C. Pre. Ch. 312. Gilb. Rep. 70. Lex Prætoria, 240, 241. |
| (l) Feversham v. Watson, Ch. Cas. 26. S. C. Finch, 445, and Gilb. Lex. | | (n) Blackwell v. Nash, 1 Str. 535. |

(1) Vide *Ramsay v. Brailsford*, 2 Des. 582. But where the defendant had taken possession of the land, and paid a part of the purchase money, the court will consider this as a waiver of the objection on account of the non-performance of the plaintiff, and will decree a specific execution of the agreement: modifying it, however, according to the equity of the case. *Ib.*

In all cases, where a condition subsequent has not been performed by the time, and compensation can be made, equity will grant relief: As where a testator, having two sons and two daughters, devised his real estate to his sons, on condition they should within a specified time, pay the daughters a sum of money; and the sons failed to pay the money by the time, in consequence of which, the heirs at law became entitled to the estate; it was held, that a court of equity would relieve against the legal effect of the breach of the condition, on a tender by the devisees, of the legacies and interest. *Walker v. Wheeler*, 2 Conn. Rep. 299.

Where, on a contract for the sale of land, the payment of the purchase money is a condition precedent to the conveyance, the vendee, after default of payment, is not entitled to a decree for specific performance, though a part of the purchase money has been paid; especially, after a refusal to complete the payment, and after the vendor, with notice to the vendee, has sold the land to another. Nor in such case, will the bill be sustained for a compensation in damages. *Hatch v. Cobb*, 4 Johns. Ch. Rep. 559. *Kempshall v. Stone*, 5 Johns. Ch. Rep. 193.

So, where the plaintiff was guilty of great laches in finishing a house according to the terms of the agreement, a specific performance was refused. *Colcock v. Butler*, 1 Des. 307.

(2) A vendor may be compelled to perform an agreement for the sale of land, as to a part, where he has rendered himself incapable of conveying the whole. But where the vendor seeks a specific execution of the contract, and is unable to make a title as to a part of the subject matter, which was the principal object of the purchaser, the court will not compel the vendee to perform the contract *pro tanto*. *Waters v. Travis*, 9 Johns. Rep. 450. Vide *Hepburn v. Auld*, 5 Cranch, 262.

But where the plaintiff sold several lots of land, at auction, each lot having been put up separately, and, afterwards, it was discovered, that the vendor had no title to one of the lots, a specific performance as to the lots to which the vendor had title, was decreed. *Osborne v. Bremar*, 1 Des. 486.

dren may compel a performance. If the Mother's Father, for instance, hath agreed to give a Portion, and the Husband's Father hath agreed to make a Settlement, though the Mother's Father do not give the Portion, yet the Children may compel a Settlement; for non-performance on one part will be no impediment to the Children receiving the full benefit of the Settlement; so if there be a failure on the part of the Father's relations it is the same; all the Court could do in that Case would be to lay hold on such Estate as he should claim, towards making good his portion of the Settlement; for the Children are considered as Purchasers, and entitled to all the benefit of the uses under the Settlement, notwithstanding there has been a failure on one side (o).

Where, however, the performance of a Marriage Contract is sought by the defaulting Party, he cannot enforce it against the Person injured by his default. If a Woman upon her Marriage, contracts for the Settlement of her Estate in a certain way, by which the Husband is to gain a benefit, and he contracts to make a Settlement, and she appears not to have the Estate she contracted to settle, the object of that contract being to give a larger Settlement to her, that might be a Case in which the Wife should not be allowed to have the benefit of the Husband's contract; but that would not affect the Children; they must have the Estate (p).

*421] *If the Plaintiff has taken all proper steps towards the performance of his part of the Agreement, but has been prevented completing it by the neglect of the Defendant, his endeavours will, both at Law and in Equity, be considered as equivalent to performance (q).

If a Man, after entering into a Contract for a Lease, commits a *Felony*, the Court will not enforce the Contract (r).

So if the Tenant has treated the Land in an unhusbandlike manner, and has been guilty of various breaches of covenant, for which the Lessor had a right of re-entry, the Court will not decree a specific performance in his favour (s).

Lord Rosslyn appears to have thought, a Wife who had committed adultery, or eloped, could not enforce a specific performance of Articles for a Jointure (t); and *Lord Manners* concurred in the justice of that opinion, but considered himself as bound by authority, and decided (u), as other judges had previously

(o) *Hervey v. Ashley*, 3 Atk. 610. *Perkins against Thornton*, Ambl. 502; and see *Pyke v. Pyke*, 1 Ves. 377; and what is said in *Hilton v. Biscoe*, 2 Ves. 309. *Crofton v. Ormsby*, 2 Sch. & Lefr. 602.

(p) *Crofton v. Ormsby*, 2 Sch. & Lefr. 602, 3.

(q) 1 Fonb. Tr. Eq. who quotes Roll's Abr. 455, 457, 458. Litt. s. 335.

Blackwell and Nash, 1 Str. 533. *Hotham and East India Company*, 1 T. R. 638.

(r) Sic dict. in *Willingham v. Joyce*, 3 Ves. 168.

(s) *Hill v. Barclay*, 18 Ves. 68.

(t) See what is said in *Buchanan v. Buchanan*, 1 Ball & Bea. 206.

(u) Ibid. 203.

done (x), that the Articles might, under such circumstances, be enforced.

Insolvency admitted, and not cleared away, is a weighty objection to a specific performance of an Agreement for a *Lease* (y); and where there was an *act of Bankruptcy, and a [*422 Docket struck, but no commission issued, it was held to be a sufficient objection to a Bill for a specific performance of a previous Contract for the Sale of an Estate to the Plaintiff, though part of the Money had been paid, and sub-contracts for Sale of part entered into by the Plaintiff; and the Defendants had agreed to convey accordingly (z).

If the Vendee dies, and his affairs, after four or five years. are unsettled, the Vendor may file a Bill to have the Contract rescinded, and the Agreement delivered up, and his Costs paid out of the Deposit (a).

It has never been determined that the Assignees of a Bankrupt can compel a Landlord specifically to perform an Agreement to grant a *Lease* to the Bankrupt (b). *Lord Rosslyn* would not say it was impossible, and would not allow a *Demurrer* to a Bill for that purpose (c); but *Sir William Grant* considered the difficulty as insurmountable (d), and there is a Decision (e) in conformity with his opinion. Where there was an Agreement for a *Lease*, with a proviso against an Assignment without License, and the intended Lessee became Bankrupt, it was clearly held that a specific performance could not be enforced (f).

*The specific performance of an Agreement is sometimes refused on grounds of *public policy*. As, where the Agreement originated in communications to the Defendant by the Commissioners, who took the depositions in a cause, and by the Witnesses, as to the nature and effect of the Evidence (g).

On the same ground the Court has refused to enforce an Agreement by an Officer in the Army, for an Assignment of his Half-pay (h); or an Agreement by a Jailer to assign his Fees (i).

An Agreement, it seems, must be *mutual* in order to be en-

(x) See *Sidney v. Sidney*, 3 P. Wms. 260. *Winter v. Blount*, 3 P. Wms. 276, in note; *Seagrave v. Seagrave*, 13 Ves. 439.

(y) *Buckland and Hall*, 8 Ves. 95; and see *O'Herlihy v. Hedges*, 1 Sch. & Lefr. 130.

(z) *Franklin v. Lord Brownlow*, 14 Ves. 550. *Low v. Lush*, 14 Ves. 547. S. C. MS.

(a) *Macreth v. Marlar*, 1 Cox, 259.

(b) See *Weatherall v. Geering*, 12 Ves. 513; in *Flood v. Finlay*, 2 Ball

and Bea. 9, the question was made, but not decided.

(c) *Brooke v. Hewitt*, 3 Ves. 253.

(d) *Weatherall v. Geering*, 12 Ves. 512.

(e) See *Moyes v. Little*, 2 Vern. 194.

(f) *Weatherall v. Geering*, 12 Ves. 504.

(g) *Cooth v. Jackson*, 6 Ves. 12.

(h) *Stone v. Lidderdale*, 2 Anstr. 533.

(i) *Mithwold v. Walbank*, 2 Ves. 238.

forceable; (1) the tie must be reciprocal (*k*). Where, therefore, nothing has been done under an Agreement (*l*), the Court will not, it seems, (except, perhaps, in the case of an *Infant* Plaintiff) (*m*), decree a specific performance, unless the right to compel is *mutual*. The case of *Hatton and Gray* (*n*) is often cited to show that it is sufficient that the Agreement should be signed by the Party against whom the performance is sought; but, says Lord *424] *Redesdale* in his *observations on that Case, "to give the Statute such a construction would make it really a Statute of *Frauds*, for it would enable any Person who had procured another to sign an Agreement, to make it depend on his own will and pleasure whether it should be an Agreement or not" (*p*). In *Hatton v. Gray*, so much relied upon as the leading Case on the subject, the ground of the decree for a specific performance appears (not indeed in the short note in Eq. Cas. Abr. but in Gilbert's *Lex Prætoria*) (*q*), to have been, that the Plaintiff drew up the Agreement in his own hand, and that procuring B. to sign it, on his part, the signing of B. was considered not only a signing for himself, but as authorized by the Plaintiff to close the Agreement; and therefore if B. had come into a Court of Equity against A. the Court would have decreed the Agreement against A. The reasoning of the Case is rather strained, and would not now hold good (*r*), but the Case shows the Court thought the Agreement must be mutual; and therefore, with all due deference, it was not, as Lord *Redesdale* and others (*s*) seem to suppose, a Case where the Agreement was not considered as mutual, but the contrary. It is, therefore, when justly considered, an authority in favour of his Lordship's interpretation of the Statute. There are, however, several Cases in which it has been held, that an Agreement signed only by the Party against

(*k*) *Grounds and Rudiments of Law and Equity*, p. 19. *Armiger v. Clarke*, 9 Bunn. 111.

(*l*) *Hawkins v. Holmes*, 1 P. Wms. 770. *Armiger v. Clarke*, Bunn. 111; and see *Howel v. George*, 1 Madd. Rep. 12.

(*m*) See dict. in *Shannon v. Bradstreet*, 4 Sch. & Lefr. p. 58. An Infant cannot, it seems, be compelled to perform an Agreement, *Conway v. Shrimpton*, Dom. Proc. 19 Jan. 1710, noticed in *Grounds and Rudiments of Law and Equity*, 19. Lord Harcourt expressing the result of this Case in his MS. Tables, says, "Agreement made with an Infant not binding because ex

parte, and remedies not mutual; from which it would seem the Agreement was bad on both sides."

(*n*) 2 Ch. Cas. 164. S. C. 1 Eq. Abr. 21.

(*p*) *Lawrence and Butler*, 1 Sch. & Lefr. 20. *Kine v. Balse*, 3 Ball & Bea. 349; and see *Hall v. Butler*, 1 Eq. Abr. 20.

(*q*) *Lex Prætoria*, MS.

(*r*) *Wright v. Dannah*, 2 Campb. 203.

(*s*) *Newland on Contracts*, 171. 155. *Roberts on Frauds*, p. 124. *Sugden's Law of Vend. & Purch.* 71. 6th edit.

(1) Vide *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 282. *Benedict v. Lynch*, 1 Johns. Ch. Rep. 370.

*whom a specific performance is sought, will be decreed (t) ; but the point seems unsettled. [*425

The effect of *inadequacy of Price* upon Contracts has been already considered (x), and it is not necessary, in this place, to say more than that where a Sale has been for a very low price (y), or extremely unreasonable (z), the Court will not enforce a *specific performance* ; (1) but where, by some occurrence subsequent to the Agreement, it becomes a beneficial bargain, or turns out to be a losing concern, the same will be decreed (a) ; accidental subsequent advantage forming no objection to a specific performance (b). Where, however, there has been such an alteration of the Property that it cannot be enjoyed according to the stipulations of the Agreement, a specific performance has been refused (c).

An Agreement to sell at a *fair valuation* may be *en- [*426 forced (d) ; and if the terms of an Agreement are to be ascertained by an Award, and are so ascertained, a Court of Equity will enforce the Agreement if any thing is to be done *in specie* ; as Estates to be conveyed, &c. (e) ; but if no Arbitration Bond

(t) *Seton v. Slade*, 7 Ves. 275. *Fowle v. Freeman*, 9 Ves. 351. The point is treated doubtfully in *Hudleston v. Briscoe*, 11 Ves. 592, and with some doubt in *Western v. Russell*, 3 Ves. & Bea. 192 ; see what is said in *Allen v. Bennet*, 3 Taunt. 176.

(x) *Ante*, p. 119, 267.

(y) *Collet against Woblaston*, 3 Bro. C. C. 228 ; see also *Day v. Newman*, 2 Cox, 77 ; in *Newland on Contracts*, p. 66, and in 10 Ves. 300. *Savage v. Taylor*, Fon. 234. *Underwood v. Hithcox*, 1 Ves. 279 ; but see *Western v. Russell*, 3 Ves. & Bea. 192, 3.

(z) *Barnardiston v. Lingood*, Barn. 341. S. C. 2 Atk. 133. See 1 Eq. Abr. p. 17, in margin. See *Anon* 2 Ch. Cas. 17. *Hick v. Phillips*, Prec. Ch. 575 ; and see *Preston and Wasey*, Prec. Ch. 76. S. C. 2 Eq. Abr. 55 ; and also the

cases mentioned in margin, *Tristram and Melhuish*, Vin. Abr. tit. "Contract and Agreement," (P.) Ca. 10. *Squire and Baker*, *ibid.* Ca. 12. See also dictum in *Savile v. Savile*, 1 P. Wms. 747.

(a) *City of London v. Richmond*, 2 Vern. 423. S. C. Prec. Ch. 156. ; and see *Cass v. Ruddle*, 2 Vern. 280, and what is said of *Cass v. Ruddle*, in *Pope v. Roots*, 7 Bro. P. C. 184 ; but see cases on a contrary principle, Ch. Ca. 19. *Awbry v. Keene*, 1 Vern. 472.

(b) *Anon.* MS.

(c) *City of London v. Mitford*, 14 Ves. 41.

(d) *Emery v. Wase*, 5 Ves. 846. *Milnes v. Gery*, 14 Ves. 407. *Wilkes v. Davis*, 3 Meriv. 509.

(e) As to this see *Hall v. Hardy*, 3 P. Wms. 189.

() Vide *Seymour v. Delancy*, 6 Johns. Ch. Rep. 222. An agreement must be fair and just in all its parts, otherwise, a specific performance will not be decreed. *Ib.* *Clitherall v. Ogilvie*, 1 Des. 257. Inadequacy of price, though not so great as to amount to fraud, may be a sufficient ground for refusing to decree a specific performance of a contract : And though mere inadequacy of price, without other circumstances, may not be sufficient to set aside the transaction, yet it may be sufficient to induce the court to withhold the exercise of its discretionary power to enforce the performance of a contract for the sale of land, and leave the party to his remedy at law ; especially, where the inadequacy of price, (being half the value,) is so great as to give to the transaction the appearance of unreasonableness, &c. *Ib.* *Osgood v. Franklin*, 2 Johns. Ch. Rep. 23. S. C. on appeal, 14 Johns. Rep. 527. Vide *Clitherall v. Ogilvie*, 1 Des. 250. Mere inadequacy of price, will not invalidate a sale at auction, under legal process. *Livingston v. Byrne*, on appeal, 11 Johns. Rep. 555.

has been executed (*f*), or if there is not a valid Award, as agreed upon, the Court will not specifically perform the Agreement, unless there has been *acquiescence* under the invalid Award; or the Agreement, evidenced by the Award, has been *in part performed* *g*; but where the Award has not been partly performed, a specific performance has been refused (*h*).

If there is a *want of certainty* in the terms of the Agreement it will not be decreed (*i*); as, where a Tenant in Tail, with power to make a Jointure, articulated, in consideration of Marriage, to make a Jointure, without saying out of what Lands, or to what amount, and the Wife died, and her Executrix filed a Bill for an account of the Profits of the Lands articulated to be settled, the Bill was dismissed (*k*). So where a Man, in consideration of Marriage, promises by letter to pay his Daughter a Fortune, without reducing it to any certainty, a Court of Equity cannot carry it into a specific execution (*l*). Many other Cases have *427] *been decided on the same principle—the want of *certainty* in the Agreement (*m*).

But the Court will, if it can, execute an uncertain Agreement, by reducing it to a certainty (*n*); and where a thing is to be done, but *no time* fixed, the Court has, in some cases, decreed a performance in a *reasonable* time (*o*).

Though the subject matter of an Agreement in order to be enforced must be clearly defined, yet in Agreements between parties many things not particularized are understood as agreed upon. If, for instance, a Man covenants to sell a Fee-simple Estate, free from encumbrances, and says no more, this Covenant alone, entitles the purchaser to proper Covenants. It is well settled what are the proper Covenants, where the Vendor was himself a purchaser for a valuable consideration, or where he acquired the Property by descent, or by purchase. A Person agreeing to sell an Estate in fee-simple must covenant that he is seised, and has power to convey in fee; for quiet enjoyment;—that the Estate is free from encumbrances; and for further assurance; and if the Vendor purchased the Estate for a valuable consideration, and obtained proper covenants for the Title, he must deliver, or covenant to produce, his Title Deeds, and covenant against his own acts only. If the Vendor's Title

(*f*) Wilkes v. Davis, 3 Meriv. 509.

(*g*) Blundell v. Brettargh, 17 Ves. 232. Cooth v. Jackson, 6 Ves. 34. Milnes v. Gery, 14 Ves. 400, overruling Hall and Warren, 9 Ves. 605, as to this point; and see Norton v. Mascall, 2 Vern. 24.

(*h*) Bishop and Webster, 1 Eq. Abr. 51. S. C. Precedents in Ch. 223; and 2 Vern. 444.

(*i*) Lindsay v. Lynch, 2 Sch. & Lefr. 7. Harnett v. Yelding, 2 Sch. & Lefr. 555.

(*k*) Elliot v. Hele, 1 Vern. 406.

(*l*) Hall and Butler, Gilb. Rep. Prætoria, MS. 1 Eq. Abr. 20.

(*m*) See Bromley v. Jefferies, 2 Vern. 415, and Emery and Wase, 5 Ves. 849. Brodie v. St. Paul, 1 Ves. jun. 326, and what is said in Lindsay v. Lynch, 2 Sch. & Lefr. 7.

(*n*) See Allen and Harding, 2 Eq. Cas. Abr. 17. pl. 6.

(*o*) Southwell v. Adby, Hil. 6 Geo. 2. 1732. MS. contra, 2 Ch. Rep. 17.

is by Descent, Devise, or otherwise *as a Purchaser not [*428 for a valuable consideration, the Vendor must covenant, not only for himself, but against the acts of the last purchaser; or at least, of the person immediately preceding him (*p*). And if there should have been an immediate Heir, supposed to be dead, it is reasonable the Covenants should extend to his acts; but if the Sale takes place under such circumstances, that it was not known whether there was an intermediate Heir, and the consideration Money is reduced in proportion to the doubt upon the Title in that respect, there is no need of a Covenant against the acts of such Heir (*q*).

Where an Estate is agreed to be sold for the payment of Debts, and no surplus remains, the Court will not require the Heir to covenant any further than for his own acts (*r*); and the rule is the same in such case as to a Devisee; but if a Sale be decreed, and after such Sale a considerable surplus comes to the Heir at Law or Devisee, the Heir has been directed to covenant that neither he, nor the immediate ancestor under whom he claims, and, in the case of a Devisee, that neither he nor his Devisor have done any act to encumber (*s*).

Where there is simply an Agreement for a Lease for a certain number of years, and no more, this *entitles a Party to the [*429 usual Covenants (*t*); and it seems now fully established, though there are Cases to the contrary (*u*), that an agreement for a Lease with usual Covenants, does not include a Covenant against Alienation without License (*x*). If the Agreement were, to grant a farm Lease, with the usual and customary Covenants of the neighbourhood, what such usual and customary Covenants are, might be made the subject of inquiry before the Master (*y*).

In an Agreement between Landlord and Tenant, the word *clear* is construed clear of all Outgoings, Encumbrances, and extraordinary Charges, not according to the custom of the Country, as Tithes, Poor-rates, and Church-rates, which are natural charges on the Tenant (*z*).

He who takes the assignment of a Term is bound to give a Covenant of Indemnity to the Assignor against the payment of the Rents, and the performance of the Covenants: and there is

(*p*) Vid. Church and Brown, 15 Ves. 263, in note by Mr. Vesey. Loyd v. Griffith, 3 Atk. 267. 2 Bos. & Pull. 22; and see Sudg. Vend. and Purch. 368, &c. and p. 457, &c. 4th. Ed. see also 14 Ves. 239.

(*q*) Vid. Pickett and Loggon, 14 Ves. 239.

(*r*) Loyd v. Griffith, 3 Atk. 207.

(*s*) Ibid. 268.

(*t*) Church v. Browne, 15 Ves. 258.

(*u*) Vere and Lovedon, 12 Ves.

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179. Jones v. Jones, 12 Ves. 186, following Folkingham v. Croft, 3 Anstr. 700. Morgan v. Slaughter, 1 Esp. N. P. C. 8.

(*x*) Church v. Browne, 15 Ves. 258, and Browne v. Raban, 15 Ves. 528, following Henderson v. Hay, 3 Bro. C. C. 632.

(*y*) Boardman v. Mostyn, 6 Ves. 471.

(*z*) Lord Tyrconnel v. Duke of Ancaster, Ambl. 240.

no distinction between the cases of an Assignment by the original Lessee and by an Assignee of that original Lessee (a).

As Powers of selling, exchanging, and investing in new Purchases, are usual in Settlements, so if there be a clause in Marriage Articles for *all usual Powers*, *those Powers must be introduced into the Settlement (b).

Of all objections to a specific performance, *the want of a Title* is that which is most frequently urged by a Defendant.

A Purchaser is not obliged to take an *equitable Title* (c) unless where Estates are sold under a Decree, before a Master (d); but has a right to insist upon having a *clear legal Title*, (1) commencing at least sixty years anterior to the time of his purchase; (2) and sometimes for a longer period, where there are Remainders after existing Estates-Tail (e).

If objections are made to a Title, the Chancellor may be called upon to decide whether a good legal Title can be made; but as this is a pure question of Law, if any doubt arises, it is usually referred for the opinion of a Court of Law, the most authoritative Forum on such points. The Equity Reports abound with decisions on objections made to Titles; but the consideration of such of them as relate merely to questions of Law is not within the design of this Work. In treating of this subject here, it will be confined to such questions as can arise only in Courts of Equity.

If there be a difference in value between the real Interest of the Vendor, and the Interest represented as proposed for Sale, *431] (though innocently *misrepresented) (f), the Purchaser is entitled, if he chooses, to abide by the Purchase, and to have such difference deducted from his purchase money (g) by way

(a) *Staines v. Morris*, 1 Ves. & Bea. 8 *Wilkins v. Fry*, 1 Meriv. 244.

(b) *Peake v. Penlington*, 2 Ves. & Bea. 311.

(c) *Cooper v. Denne*, 4 Bro. C. C. 80. S. C. 1 Ves. Jun. 565.

(d) *Sugd. Vend. and Purch.* 271; and see *Chandler and Beard*, 1 Dick. 392, there quoted; and also *Marlow and*

Smith, 2 P. Wms. 198, and *Shaw v. Wright*, 3 Ves. 22.

(e) *Sugd. Vend. &c.* p. 259. &c. 4th edit.

(f) *Hill v. Buckley*, 17 Ves. 401. *Barker v. Damer*, Dom. Proc. 7th April 1731.

(g) *Milligan v. Cooke*, 16 Ves. 1; and see what is said in *Seaman v. Vawdry*, 16 Ves. 290, and 390.

(1) Vide *Butler v. O'Hear*, 2 Des. 382. It is no objection to decreeing a specific performance of an agreement for the conveyance of land, that no time is limited within which the title is to be made. In such case, a reasonable time will be intended. *ib.* 398.

(2) But where the purchaser of real estate, proceeds in the negotiation, after he is made acquainted with the title and nature of the tenure, and after a length of possession sufficient to bar the right of entry, and after a confession of judgment for the purchase money, the contract will not be set aside, on the allegation of an imperfect or encumbered title, which is not clearly shown to be such. In this case, the conduct of the party will be deemed as a waiver of the objection as to title. *Reach v. Rutherford*, 4 Des. 126.

of compensation (*h*), nor can the Vendor refuse (*i*): and if the Master on a reference to him is unable to ascertain the difference in value, but the Purchaser is content to take such Interest as can be conveyed to him, with such Indemnity, as under all the circumstances the Master shall think just and reasonable, a Decree to that effect will be made. If, for instance, a Man agrees to sell an Estate in Fee, and he has only a Term, he may be compelled to convey the Term (*k*). So, if there is a considerable part of the Land purchased to which no Title can be made, the Vendor may be compelled to convey so much of the Land to which there is a good Title; unless, perhaps, where there would in consequence be a very great deterioration to the remaining property (*l*).

It is true, therefore, generally, though not universally (*m*), that a Purchaser may insist on compensation, if he undertakes on his part to do what the Court shall order (*n*); but the Vendor cannot, it seems, (except where the party gets, *substantially*, that for which he contracts) (*o*) insist upon the Purchaser's *taking a compensation. (1) If, therefore, a Purchaser [*432 agrees to buy a Freehold estate, he cannot be compelled to accept one that is Leasehold (*p*). If a Contract be for a House and a Wharf, the Wharf being the principal inducement to the Purchase, a Purchaser will not, it seems, be obliged to take the House only (*q*). And so if Land be represented as Freehold, with Leasehold adjoining, and is found to be Leasehold only (*r*), or part of the purchased Estate, though small in proportion to

(*h*) See *Halsey and Grant*, 13 Ves. 77. *Grant v. Munt*, Coop. 173.

(*i*) *Mortlock v. Buller*, 10 Ves. 316; but see the case as to an agreement to assign a lease, mentioned in 1 Fonbl. 212; and what is said 1 Ves. & Bea. 225.

(*k*) See *Wood v. Griffiths*, 1 Wils. C. C. 44.

(*l*) See *Western v. Russell*, 3 Ves. & Bea. 192.

(*m*) *Paton v. Rogers*, 1 Ves. & Bea. p. 353.

(*n*) *Ibid.*

(*o*) See *Calcraft v. Rosbuck*, 1 Ves. Jun. 321. *Drewe and Corp*, 9 Ves. 368. *Halsey and Grant*, 13 Ves. 78; and see *Hornblow v. Shirley*, *ibid.* 81. *Dyer and Hargrave* 10 Ves. 507. *M'Queen v. Farquhar*, 11 Ves. 467. *Alley and Deschamps*, 13 Ves. 228. *Poole v.*

Shergold, 1 Cox, 273.

(*p*) *Fordyce v. Ford*, 4 Bro. C. C. 497. *Drewe v. Corp*, 9 Ves. 368. *Halsey v. Grant*, 13 Ves. 78.

(*q*) That was Lord Erskine's opinion in *Stapylton and Scott*, 13 Ves. 427, contrary to Sir Thomas Sewell's decision, mentioned in *Seton v. Slade*, 7 Ves. 270; and see what is there said by Lord Eldon, and the case as to tithe, there mentioned, since reported in 1 Cox, 59, and *Poole* against *Shergold*, 2 Bro. C. C. 113. S. C. 1 Cox, 273; see also *Halsey and Grant*, 13 Ves. p. 78; but see *Drewe and Hanson*, 6 Ves. 675.

(*r*) *Fordyce and Ford*, 4 Bro. C. C. 498; and see *Drewe v. Corp*, 9 Ves. 368, and *Alley and Deschamps*, 13 Ves. 228.

(1) A court of chancery, unless in very special cases, will not sustain applications for specific performances of agreements, merely for the purpose of giving the party a compensation. *Hatch v. Cobb*, 4 Johns. Ch. Rep. 559. *Kempshall v. Stone*, 5 Johns. Ch. Rep. 193.

the whole Estate, is essential to the Purchase (s), the Purchase would not be enforced. (1)

If the printed Particulars of Sale contain a *wilful* mis-description of Property, the Purchaser cannot be compelled to take a *compensation* (t).

A Purchaser is not compellable to take an Indemnity against a Judgment amounting to half of the purchase-money (u).

A Lessee, who described his Interest as fifty years, the residue *433] of a Term, free from Encumbrances, but *who in fact had only three years of an old Term, and a reversionary Term from another Lessor, and old encumbrances not shown to be discharged, could not, it was determined, enforce a specific performance (x).

A Purchaser has been held not to be entitled to an abatement for a deficiency in the *quantity* of acres sold, where the Particular described the Estate as containing by estimation, so many acres, "*be the same more or less*" (y). (2)

Where a Bill is filed for the specific performance of a Contract for the purchase of Real Estate, the Defendant, in ordinary cases, may, if he chooses, have a reference to the Master,

(s) *Knatchbull v. Grueber*, 1 Madd. Rep. 153, confirmed on appeal, 3 Meriv. p. 124.

(t) See *Stewart v. Alliston*, 1 Meriv. 26. *Duke of Norfolk v. Worthy*, 1 Campb. 337.

(u) *Wood v. Bernal*, 19 Ves. 220.

(x) *White v. Foljambe*, 11 Ves. 337.

(y) *Wineh v. Winchester*, 1 Ves. & Bea. 375.

(1) But, on a sale at auction, *bona fide*, where there is no question as to title, or quantity of land, and the description of it is substantially true, though in a small degree defective or variant, as where a building projected two feet on the land sold, performance of the contract will be decreed; and the vendee will be entitled to compensation for any diminution in value arising from the projection of the building, to be deducted from the price. *King v. Bardsau*, 6 Johns. Ch. Rep. 38. And where possession has been taken of land, under an imperfect agreement for a conveyance or lease, and improvements have been made, though chancery will not decree a specific performance, on the ground of part-performance, yet the bill may be retained for the purpose of giving the party a compensation for lasting and beneficial improvements. *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 273. But *vide contra*, S. C. on appeal, 14 Johns. Rep. 15. The Court of Errors, under the circumstances, was of opinion that the conduct of the respondent was a fraud on the appellants, and a specific performance was decreed.

So, where a bill, filed to compel the performance of a parol agreement entered into between the plaintiff and commissioners authorized by statute to drain certain drowned lands, to compensate him for the use of his land, &c., could not be sustained, the agreement being within the statute of frauds; yet the court retained the bill, and awarded an issue of *quantum damnificatus*, to assess the damages sustained by the plaintiff, for which he had no remedy, or at best, a doubtful one, at law. *Phillips v. Thompson*, 1 Johns. Ch. Rep. 132.

So, where, by mistake, a party cannot possibly perform his contract for the sale of land, an issue of *quantum damnificatus* will be directed, to ascertain the damages the plaintiff has sustained for the non-performance. *M'Ferran v. Taylor*, 3 Cranch, 270.

(2) But where there is simply a deficiency in quantity, a specific performance of a contract for the sale of land will be decreed, on the principal of compensation. *Hepburn v. Auld*, 5 Cranch, 262.

to see if a good Title can be made ; and the Court never acts upon the fact, that a satisfactory Abstract of the Title was delivered, unless the Party has clearly bound himself to accept the Title upon the Abstract (*z*), as by taking possession for a considerable time, and making no objection to the same (*a*). But the circumstance of an Abstract being shown to a Purchaser, previous to the filing of a Bill for a specific performance, in which the defect of Title appears, does not bind the Purchaser (*b*). Though the Party cannot state any objection to the Title as it appears in the Abstract, yet he may insist on a Reference ; and the reason seems to be, that by the ordinary decree in these cases the other Party is compelled to produce all the deeds, papers, &c. in his custody or power ; from *which, rea- [*434 sonable and solid objections to the Title may be furnished, which would never have fallen under the view of the Purchaser, unless the Court wrung from the conscience of the Vendor that sort of information which a Purchaser could by no other means acquire : Inquiries and Examinations also may be directed, by which the Title may be sifted in a way in which it never could upon a mere Abstract, authenticated as the Vendor thought proper (*c*).

A Defendant, however, against whom a specific performance is prayed, may by his answer waive his right to have a Reference, and call upon the Court to decide upon his objections to the Title ; but in such case the Answer must be unequivocal, and the Defendant must not be drawn into it by surprise or fraud, and want of full information, and its propriety not rendered disputable by any subsequent discovery (*d*). And this course seems highly reasonable ; for if it clearly appears to the Court, upon the Pleadings and the Evidence, that there are irremovable objections to the Title, it would be an unnecessary expense to direct a Reference to the Master (*e*).

“ I have heard it said,” says *Sir Thomas Clarke*, “ a Title purchased under a Court of Equity must be, like Cæsar’s Wife, even without any suspicion” (*f*) ; and, certainly, the Court will always pause where doubts raised upon a Title are reasonable and fair, and will not compel a Purchaser to take property, *not marketable (*g*). Many cases established it as a Rule, [*435 (impugned, indeed in a very recent case) (*h*), that though in the judgment of the Court the better opinion is that a Title can be

(*z*) *Jenkins v. Hiles*, 6 Ves. 646.
 (*a*) *Fleetwood v. Green*, 15 Ves. 594.
Margravine of Anspach v. Noel, 1 Madd. Rep. 310 ; and see *Fludyer v. Cocker*, 13 Ves. 27.

(*b*) *Stapylton v. Scott*, 16 Ves. 274.
 (*c*) 6 Ves. 653.
 (*d*) *Jenkins v. Hiles*, 6 Ves. 653,
 655. *Balfour v. Welland*, 16 Ves.
 151.

(*e*) See *Omcrod v. Hardman*, 5 Ves.
 731.

(*f*) *Sedgewick v. Hargrave*, 2 Ves.
 57.

(*g*) See *Marlow and Smith*, 2 P. Wms.
 p. 201 ; and *Lord Braybroke v. Inskip*,
 8 Ves. 428.

(*h*) See *Biscoe v. Perkins*, 1 Ves. &
 Bea. 492, 3.

made, yet if there is a considerable, a *rational*, doubt, the Court has not attached so much credit to its own opinion as to compel a Purchaser to take the Title, but leaves the Parties to Law; and this, whether the doubt arises as to the *quantity* of the Estate of which the Seller is possessed; or upon a *legal* (i) *objection*. Nor will a Case for the opinion of a Court of Law be directed without the Purchaser's consent (k); and if after a Certificate of the Court of King's Bench, the Chancellor retains a doubt, a Purchaser will not be compelled to take the Title (l), but may require another Case, directed to another Court (m). If at Law the Title appears *doubtful*, the Court will not relieve (n).

Where the objection has been respecting the legitimacy of a Party, the Court has said there are many cases in which a Jury will collect the fact of legitimacy from circumstances, in which it might be attended with so much reasonable doubt, that the Court would not compel a Purchaser to take it merely because there was a verdict (o).

*436] *But though the Court will not force a doubtful Title upon a Purchaser, yet in these cases, it seems, the Court will govern itself by a *moral certainty*; for it is impossible in the nature of things, there should be a *mathematical certainty* of a good Title. There are, frequently, suggestions of old Entails, and often doubts, what Issue persons have left, whether more or fewer; and yet these were never allowed to be objections of that force as to overturn a Title to an Estate (p). Presumptive Evidence, on which a Jury would presume a person dead, is sufficient in such cases, as it is in cases of Pedigree (q).

It is no objection to a Title, derived under a grant from the Crown, that there is a reservation of Royal Mines, if there has never been an exercise of the right, or a probability that there ever will; for there is no instance where the Crown has only a bare reservation of Royal Mines without any right of Entry, that it has granted a license to any person to come upon another Man's Estate, and dig up his Soil and search for such Mines; though when they are once opened they can restrain the Owner of the Soil from working them, and can either work them themselves, or grant a License for others to work them (r).

Where the Title is clear, but there are Terms or Encumbrances to be got in, the established course is that the Master

(i) *Stapylton v. Scott*, 16 Ves. 274; and see *Rose v. Calland*, 5 Ves. 188, 189, and *Cooper v. Danna*, 1 Ves. Jun. 565, and *Wheate and Hall*, 17 Ves. 80.

(k) *Rouke v. Kidd*, 5 Ves. 647.

(l) *Sheffield v. Lord Mulgrave*, 2 Ves. Jan. 529.

(m) *Trent v. Hanning*, 10 Ves. 500.

(n) See *Hartley v. Peahall Peake*, N. P. 130, and see *Wilde v. Fort*, 4 Taunt. 334.

(o) See *Lord Braybroke v. Inskip*, 8 Ves. 428.

(p) *Lyddal v. Weston*, 3 Atk. 20.

(q) *Machell v. Taylor*, 25th Jan. 1818. MS.

(r) *Lyddal v. Weston*, 3 Atk. 20.

reports in favour of the Title ; and a Reference is made to him, to approve a Conveyance ; and then the Question arises whether all the parties to a proper Conveyance are brought before *the Court, and if it appears all necessary Parties are not [*437 before the Court, such Persons must be made Parties (s), otherwise the Bill would be dismissed with Costs (t). An Exception cannot be taken to the Master's Report of a good Title, on the ground, that the Trustee of an outstanding term is a Lunatic (u), or that the Estate was not tithe-free (x), for these are questions of Conveyance not of Title.

It is no objection to a Title that an Extent has issued from the Crown against the Owner, which remained in the hands of the Sheriff unexecuted, it appearing that the Lords of the Treasury had, in fact, compromised the Debt, though no writ of *amoveas manus* had actually issued (y).

It was formerly doubtful whether upon a Contract to sell a Lease the Vendor was bound to show that the Lessor had a good Title (z) ; the prevailing opinion seems to have been that he was. In general, where the convenience of the case requires it, it is provided in the Particulars of Sale, or in private Agreements, that the Purchaser shall not insist on seeing the Lessor's Title. It has been recently decided, that the Vendor of a Lease cannot maintain a Bill for a specific performance, unless he produces the Title of his Lessor (a) ; except, perhaps, *where [*438 there has been such a length of Possession under the original Lease as would raise a presumption of Title (c). In the case of a *Bishop's Lease*, the Vendor has been held, on a Bill for a specific performance, not obligated to produce the Lessor's Title (d).

If Assignees exhibit to Sale a Freehold Estate of Inheritance, not marking by the Contract that they meant to sell any thing more than it shall turn out the Bankrupt had, they are bound, as other persons are, to make a Title to the Inheritance, free from Encumbrances (e) ; but an Executor, selling, is not bound to covenant for the Title (f). A Bankrupt cannot be compelled to join in a Conveyance by his Assignees (g).

When Conveyances are directed by a Decree, they must be

(s) See Arg. in *Omerod v. Hardman*, 5 Ves. 725.

(t) See *Loyd v. Griffith*, 3 Atk. 267.

(u) *Barkaley v. Daub*, 16 Ves. 380.

(x) *Wallinger v. Hilbert*, 1 Meriv. 104.

(y) *Poole v. Shergold*, 1 Cox, 160.

(z) *White v. Foljambe*, 11 Ves. 337 ; and see *Radcliffe v. Warrington*, 12 Ves. 326, and *Gompertz v. —*, 12 Ves. 17.

(a) *Fildes v. Hooker*, 2 Meriv. 424.

(c) *Fildes v. Hooker*, 2 Meriv. 424.

(d) *Fane v. Spencer*, mentioned in note to *Fildes v. Hooker*, 2 Meriv. 430, and reported, 2 Madd. Rep. p. 438.

(e) *White v. Foljambe*, 11 Ves. 345 ; and see *Macdonald and Hanson*, 12 Ves. 277, overruling the doctrine in *Pope v. Simpson*, 5 Ves. 145. S. P. Ex parte *Trander*, MS. See also *Spurrier v. Hancock*, 4 Ves. 667.

(f) *Staines v. Morris*, 18 Ves. 17.

(g) *Waugh v. Land*, Coop. 134.

settled by the like kind of Rule, as men of judgment among Conveyancers would direct (*h*).

It is not necessary, in order to obtain a Decree for a specific performance, that the Vendor should have a good Title *at the time of the Sale*, for it seems, that if he can, even by an Act of Parliament, obtain a Title *before the Report*, that is sufficient (*i*); *439] *and the Decree of the Court in these cases always is to inquire whether the Seller *can* make a good Title, and whether he *could* make a Title at the time of executing the Agreement (*k*). (1) A Purchaser, therefore, cannot insist on being discharged from his Purchase upon the Master's Report of a defective Title, if the same is capable of being made good within a reasonable time; as, where the Master's Report is, that the Vendor, getting in a Term, or obtaining Administration, &c. will have a Title; but the Court will put the Vendor under terms to procure that speedily (*l*); and will not suffer a Plaintiff, at the distance of years, to come to the Court and say he is ready to make a good Title, and call for a specific performance. Cases, however, of this description, must be governed by circumstances (*m*).

If the Vendor of an Estate sold by auction does not show a clear Title by the day specified, the Purchaser may at Law recover back his deposit, and rescind the Contract, without waiting to see whether the Vendor may ultimately be able to establish a good Title or not (*n*); but still, if the Vendors can put themselves in a situation to complete the Title, a Court of Equity will compel the Purchaser to pay his purchase-money (*o*). In these cases the Vendor usually files a Bill for a specific performance, and *for an Injunction* to restrain an Action for the Deposit.

*440] *On a Reference to the *Master* to see whether a good Title can be made, the *Master* proceeds on the abstract only, unless the Purchaser requires the production of the Deeds themselves; and if he omits to make such requisition he cannot except to the Report on the ground of the Deeds not having been produced before the Master (*p*).

If I have a right to call upon *A.* to join in a Conveyance,

(*h*) *Loyd v. Griffith*, 3 Atk. 267.

(*l*) *Coffin and Cooper*, 14 Ves. 205.

(*i*) *Langford v. Pitt*, 2 P. Wms. 630. *Mortlock v. Buller*, 10 Ves. 315. S. C. MS.; and see *Jenkins v. Hiles*, 6 Ves. 654. *Wynn and Morgan*, 7 Ves 205, 206.

(*m*) *Wynn v. Morgan*, 7 Ves. 205, 6. *Jenkins v. Hiles*, 6 Ves. 646.

(*n*) *Wilde v. Fort*, 4 Taunt. 334.

(*o*) See *Seaward and Willock*, 5 East, 208.

(*k*) *Langford v. Pitt*, 2 P. Wms. 630.

(*p*) *Poole v. Shergold*, 1 Cox, 160.

(1) And so, a vendor may compel a specific performance of a contract for the sale of land, if he be able to give a good title at the time of the decree; though his title was defective at the time when the conveyance ought to have been made. *Hepburn v. Auld*, 5 Cranch, 262. Vide *Mead v. Johnson*, 3 Conn. Rep. 592.

that is matter of Conveyance ; if I have no right to call upon him, and he is a necessary party, it is matter of Title (*q*).

When on a Reference to the Master he reports that a good Title to a Purchase cannot be made, the Vendee may file a Bill against the Vendor to have the Contract delivered up; but it seems that compensation will not be granted for the loss sustained by the failure of the Contract, though the Bill pray, in the alternative, a specific performance, or an issue, or an inquiry before the Master with a view to damages (*r*), that being more properly the subject of an Action (*s*). In *Denton v. Stewart* (*t*), it is observable the defendant had it in his power to perform the Agreement, and put it out of his power pending the Suit. "That Case, if not supportable on that distinction, is not," says *Lord Eldon*, "according to the principles of the Court" (*u*).

*If a Vendor, upon the Title being objected to, offers [*441 to let off the Purchaser, but he still adheres to the Purchase, the Purchaser must pay the Costs if the Title is determined to be good (*x*). If the Purchaser takes an unfounded objection he pays the Costs, but if the objection taken be fair and substantial, he does not pay Costs, though the objection does not prevail (*y*).

It may be proper to observe, in conclusion of this fruitful subject of Equity, that if the Purchaser does not pay the Purchase-money at the time fixed he will be chargeable with Interest; and as he must bear any loss, so likewise will he be entitled to any profits that arise from the Estate (*z*). So, in general, if a Purchaser is let into Possession and preception of the Rents and Profits of the purchased Estates, he must pay Interest for his Purchase-money (*a*); but it is not universally so (*b*); there may be a case where he shall not pay Interest, notwithstanding he has the Rents and Profits; as, where there are objections to the Title, and the purchase-money lies unproductive, and the Vendor has notice of that circumstance, and afterwards the Title is made good, the Vendee will be entitled to the Estate and the Rents and Profits, and the Vendor to the Purchase money only, without Interest (*c*). And though, generally, a Purchaser cannot be called upon for his Money until *he has a Title, yet where he is let into Possession, upon [*442 a mutual apprehension that the Title could be immediately made

(*q*) *Odder v. Ruffin*, MS. before V. C. Leach, 24 July 1818.

(*r*) *Todd and Gee*, 17 Ves. 273, which seems to overrule *Greenway v. Adams*, 12 Ves. 395.

(*s*) *Gwillim v. Stone*, 14 Ves. 128.

(*t*) 17 Ves. 276, in note, mentioned also, 1 Fonbl. Eq. 43, and 2 Vol. 438, and reported in 1 Cox, 258.

(*u*) 17 Ves. 176; and see *Ellis v. Naany*, East, 6 Geo. 2. 1733. *Blore v. Sutton*, 3 Meriv. 248.

(*x*) *Holloway v. Fell*, 31 Jan. 1818, before V. C. Leach.

(*y*) *Ailsbie v. Rice*, 3 Madd. Rep. 256.

(*z*) *Davy v. Barber*, 3 Atk. 490.

(*a*) See *Fludyer v. Cocker*, 12 Ves. 25. *Blount v. Blount*, 3 Atk. 637.

(*b*) See *Blount v. Blount*, 3 Atk. 637.

(*c*) See on this subject *Powell v. Martyr*, 8 Ves. 146.

good, he cannot, unless by express Contract, retain the Possession, without, at least, paying interest for the Purchase-money (*d*).

Where the Vendee has created unnecessary difficulties in respect of the Conveyance to him, he will be ordered to pay Interest from the time he ought to have executed the Conveyance (*e*).

When Interest is payable, it is usually at four per cent. (*f*), but upon one occasion five per cent. was given (*g*).

Money paid in as earnest at the Sale of an Estate, in whatever manner laid out, is a payment for so much of the Purchase-money (*h*). If laid out without opposition from the Seller, it must be presumed to be with his assent. If laid out under the authority of the Court, it will be binding on both (*i*).

If a Vendee, who has not completed his Purchase for want of a Title, deposits his purchase-money in the purchase of stock, and gives notice of such deposit to the Vendor, this will have the effect of stopping Interest; but the Vendee runs all the hazard of the rise and fall of the Funds; nor, in case of a rise, can the Vendor claim the benefit (*k*).

*443] *Where a trust is raised by Deed or will for the payment of Debts and Legacies *generally* (*l*), and the Rule is the same where there is a general charge, and afterwards a specific disposition (*m*), a Purchaser or Mortgagee of Real Estate is not obliged to see to the application of his Money, as he is where there is a *Schedule*, or particularizing of the Debts (*n*); unless there be any collusion between the Purchaser and the Trustee or Executor (*o*). If more Land is sold than is sufficient to pay the Debts, that will not prejudice a Purchaser (*p*). But though a general charge does not oblige a Purchaser before a Suit to see to the application of the Money, yet after a Suit commenced for an Account by the Heir against the Executor (*q*), the Purchaser has been held bound to see to the application (*r*). And

(*d*) Gibson v. Clarke, 1 Ves. & Bea. 502.

(*e*) Blount v. Blount. 3 Atk. 637.

(*f*) Child v. Lord Abingdon, 1 Ves. jun. 94. Calcraft v. Roebuck, 1 Ves. jun. 221; and see Sugd. Vend. and Purch. 404, 4th Edition, and cases cited in note; and see Acland v. Gaisford, 2 Madd. Rep. 31.

(*g*) Waldron v. Forrester, Exch. 5 June 1807, particularly mentioned Sugd. Vend. and Purch. 429, 5th Edit.

(*h*) Doyley against Powis, 2 Bro. C. C. 33.

(*i*) Poole against Rudd, 3 Bro. C. C. 49.

(*k*) Roberts v. Massey, 13 Ves. 561. Acland v. Gaisford, 2 Madd. Rep. 31.

(*l*) See Co. Lit. 290, b. note 1. s. 12.

Jebb. v. Abbot, 1 Bro. 186, n. 2. 2d Edit.

(*m*) 6 Ves. 654, in n.

(*n*) Ithell v. Beane, 1 Ves. 215. Dunch v. Kent, 1 Vern. 260. 1. Spalding v. Shalmer, 1 Vern. 301. Hardwicke v. Mynd, 1 Anstr. 109. Culpepper v. Aston, 2 Chan. Cas. 223.

(*o*) Rogers against Skillicorne, Amb. 189. Lloyd v. Baldwin, 1 Ves. 173.

(*p*) Spalding v. Shalmer, 1 Vern. 301. Lutwych v. Winsford, 2 Bro. C. C. 248.

(*q*) Culpepper v. Aston, 2 Chan. Cas. 115. 223.

(*r*) Walker v. Smallwood, Amb. 677.

where Lands are vested in Trustees by Act of Parliament, to be mortgaged for a particular purpose, it is incumbent on the Mortgagee to see the Money applied accordingly (s).

A Purchaser of an Estate under a Decree is not answerable for the mode in which the Estate has been sold by the Court, nor for the disposition which it makes of the Money (t); for a Purchaser *has a right to presume that the Court has [*444 taken the steps necessary to investigate the rights of the Parties, and that it has on that investigation properly decreed a Sale; but he is to see that it is a Decree binding the Parties claiming the Estate; that is, to see that all proper Parties to be bound are before the Court; and he has further to see, that taking the Conveyance he takes a Title that cannot be impeached *alimunde*. He has no right to call upon the Court to protect him from a Title not in issue in the cause, and no way affected by the Decree; but if he gets a proper Conveyance of the Estate, so that no Person whom the Decree affects can invalidate his Title, then, although the Decree may be erroneous, and afterwards reversed, the Title of the Purchaser will not, it seems, be invalidated (u).

CHAP. VI.

TRUSTS.

WE now proceed to the consideration of *Trusts*, a species of Jurisprudence peculiar to this country (x), and of all others the most fruitful in Cases, and comprehending a great variety of Learning; but the Rules on this subject were in the time of *Lord Hardwicke*, as he has observed, "pretty well ascertained (y)," and have since been still more reduced *to certainty by [*445 the decisions of the great Men who have succeeded him.

Conveyances to Uses did not commence in the Reign of Henry 4; but *Lord Bacon* says there were not before this time above six cases relating to Uses, and that it was not till this Reign that a *regular system* was adopted in regard to Uses (z). *Chief Justice Popham* says, that before the time of Richard 2, no Act of Parliament, or other Record, nor any Book, nor Writing,

(s) *Cotterell v. Hampson*, 2 Vern. 6.

(t) *Curtis v. Price*, 12 Ves. 103.
Lloyd v. Johnes, 9 Ves. 65. *Lott-
 wych against Winford*, 2 Bro. C. C. 248; but see *Lloyd v. Baldwyn*, 1 Ves. 173.

(u) *Bannet v. Hamill*, 2 Sch. and Lefr. 577, 8.

(x) 1 T. R. 759, in N.

(y) Letter to Lord Kaimes, *Life of Kaimes*, 1 Vol. 243.

(z) *Bacon on Uses*, p. 17.

whereof the Termor is not seised, but only possessed; and therefore, if a term of one thousand years was limited to A. to the Use of (or in trust) for B. the Statute did not execute this Use, *449] but left it as at Common *Law (u). They further held, that where Lands are limited to Trustees to receive and pay over the Rents and Profits, the use is not executed, but the Lands remain in them to answer those purposes (x). Where, therefore, there is a conveyance to Trustees in Trust to convey (y), or to sell (z), or to pay the profits to a *Feme Covert* (a); and as it seems in all cases where any control and discretion is given to the Trustees in the application of the Profits of the Estate (b), as to pay Annuities (c), or to make repairs, or to provide for the maintenance of the *Cestui que Trust*, the legal Estate remains in the Trustees, unexecuted by the Statute (d).

It was observed by *Lord Hardwicke*, that the Statute of Uses “has had no other effect than to add at most three words to a Conveyance (e);” but that position seems questionable. The Statute remedied the inconveniences it professed to remedy; and though a new species of Uses, under the name of Trusts, after-*450] wards sprang up, yet the Courts of *Equity took care that while they answered all the good purposes of Uses, they should not produce any of the inconveniences which the Statute of Henry 8th was intended to avoid.

As Uses executed are to all intents and purposes legal Estates, it is not within the design of this Work to treat on them more at length. The doctrine as to the creation, the limitation, and the extinguishment of Uses, as well as of resulting Uses, belongs principally to the consideration of Courts of Law; nor is it here required to observe on the various Conveyances operating under the Statute of Uses; such as those which pass Uses by transmutation of Possession, as a *Feoffment*, *Lease*, and *Release*, *Fine* and *Recovery*; or those which raise Uses without a transmutation of possession, as a *Bargain and Sale*, or a *covenant to stand seised* (f); nor on the doctrine of *Springing and Shifting Uses*, or Uses ope-

(u) Bac. Uses, 42. Poph. 76. Dyer, 369. 2. Black. Com. 336.

(x) 36 Hen. 8. Bro. Feoff. al. Uses, 52. 2 Black. Com. 336. Har. Co. Litt. 290b. n. 1. s. 2. Treatise of Equity, Book 2. Ch. 1. s. 4.

(y) Bac. Uses, 8 Roberts and Dixwell, 1 Atk 607.

(z) Bagshaw v. Spencer, 2 Atk. 578. Wright v. Pearson, Ambl. 360.

(a) Pybus and Smith, 3 Bro. 340. Neville v. Saunders, 1 Vern. 415. Harton v. Harton, 7 T. Rep. 652.

(b) See Gregory v. Henderson, 4 Taunt. 772.

(c) Doe on dem. White v. Simpson, 5 East, 162; and see Gibson v. Rogers,

Ambl. 93.

(d) See 2 vol. Black. Com. 336. n. 12. by Mr. Christian. Silverston v. Wilson, 2 T. R. 444. Shapland and Smith, 1 Bro. 75.

(e) Hopkins v. Hopkins, 1 Atk. 691. Blackstone, 2 Com. 336, says also, with this passage in his eye, the Statute has had “little other effect than to make a slight alteration in the formal words of a Conveyance.” I have a very full MS. note of Hopkins v. Hopkins, but there is no such remark as that alluded to in Atkyns’s Report.

(f) These Conveyances are well observed upon by Mr. Butler in his note to Co. Litt. 275 b. 276 a.

rating through the medium of *Powers*; such as Powers so common in modern settlements, and very prudent (g), of *leasing, jointuring, charging, selling, or exchanging*; or of *powers of revocation* (h). All these doctrines relate to what are considered as legal powers over legal Estates, and, as such, (except where there has been a mistaken execution of a Power (i), or where the Power is coupled with a Trust (k), upon which we have before observed,) *are within the adjudication of Courts of [*451 Common Law; nor have Courts of Equity any original or exclusive power to decide upon them. These matters, it is true, are often considered in Courts of Equity, and a thorough knowledge of them is indispensable; but it is to the Common Law Writers, and to the Common Law Reports that reference must be had for the most authoritative decisions on these subjects.

Indeed, a Person having a *legal Estate* only, and no beneficial Interest, cannot, it seems, come into Equity for any purpose (l). It may, however, be remarked, that the Courts of Common Law, in their decisions upon the creation of Estates by way of Use, show more indulgence to the intent of the Parties than they do in regard to the creation of Estates by Conveyances at Common Law (m).

It is to *Trusts*, and *Trusts* only, that the Reader's attention will here be particularly directed to that "*creature of Equity*," as it is called, of which the Common Law takes no notice, and over which Courts of Equity have an *original, a peculiar, and exclusive, Jurisdiction* (n).

In the definition of an Use as it existed before the Statute of Uses, Trusts have already been defined. A Trust is, in other words, a right in the *Cestui que Trust* to receive the Profits, and to dispose of the Lands in Equity (o), and is such a confidence between Parties that no Action at Law will lie (p). There may, however, be special Trusts, as *for the accumulation of [*452 Profits, the Sale of Estates, or the conversion of one Trust Fund into another, which may preclude all power of interference on the part of the *Cestui que Trust* until such special Trust be satisfied (q).

In general, Courts of Equity, in the *construction of Words* by which Trusts are *limited* of Real or Personal Estate, follow the Rules which Courts of Law have laid down, in regard to the

(g) See *Sutton v. Jones*, 15 Ves. 588.

(h) The subject of Powers, and all the doctrine which surrounds them, is treated of in a very masterly manner in Mr. Sugden's work on that subject.

(i) *Ante*, p. 54.

(k) See *ante*, p. 55.

(l) See *Williams v. Lord Lonsdale*, 3 Ves. 757.

(m) 2 Vol. Fonbl. Eq. p. 47. in note.

(n) See what Ch. J. Coke says 2 Bulstr. 337.

(o) 1 Mod. 17.

(p) *Sturt v. Mellish*, 2 Atk. 612.

(q) *Sanders on Uses*, 1 Vol. 215, 3d.

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creation and limitation of legal Estates (r); and this whether the Trust be created by Deed or by Will (s). Whether the words in a Deed or a Will pass an absolute or a limited Interest is decided by Rules common to both Courts (t); the only difference being that where a Trust Estate is created by Deed or Will, it is determined upon in Courts of Equity, and where a Conveyance or a Devise is of a legal Estate, it is determined on in Courts of Common Law; but the decision in each Court in the construction of words of limitation is guided by the same Rules. (1)

The principal exceptions to this general Rule are in the cases of *Articles before Marriage*, already adverted to under the head of Mistake (u), and in cases of what are termed *Executory Trusts*, which will afterwards be adverted to.

*453] *The *Cestui que Trust* has, in most respects, the same power over the Trust Estate, as owners of legal Estates are possessed of; and the Trust Estate is in general liable in the same manner as a legal Estate, except in respect of Dower (x). (2) He may alien it; and any legal Conveyance or Assurance by him has the same effect and operation upon the Trust as it would have had at law upon the legal Estate (y). A *Cestui que Trust* is always barred by length of time operating against his Trustee.

If the Trustee does not enter, and the *Cestui que Trust* does not compel him to enter as to the person claiming paramount, the *Cestui que Trust* is barred (z).

The effect of a *Fine* is the same as at Law with regard to an equitable Interest, if of such a nature, that, turned into a legal Interest, it would have been barred (a). A *Common Recovery*

(r) Duke of Norfolk's Case, 3 Cha. Cas. 48. Bale v. Coleman, 1 P. Wms. 143. Garth v. Baldwin, 2 Ves. 655. Watts v. Ball, 1 P. Wms. 108. Banks v. Sutton, 2 P. Wms. 713. Lord Portsmouth v. Lord Effingham, 1 Ves. 434.

(s) Wagstaff v. Wagstaff, 2 P. Wms. 259.

(t) See Duke of Norfolk's Case, 3 Cha. Cas. 48; and see Phillips v. Brydges, 3 Ves. 825. Lord Portsmouth v. Lord Effingham, 1 Ves. 434.

(u) Ante, p. 61.

(x) See as to this, post.

(y) North v. Champenon, 2 Ch. Cas. 63. 78. Boteler v. Allingham, 1 Bro. C. C. 72. Carteret v. Paschall, MS. S. C. 3 P. Wms. 196.

(z) Hovendon v. Lord Annesley, 2 Sch. & Lefr. 629; and see 2 Meriv. 358. 9.

(a) Willis v. Shorral, 1 Atk. 476; and see Carpenter v. Carpenter, 1 Vern. 440. Penn v. Peacock, Mic. 8 Geo. 2. 1733.

(1) No particular form of words is necessary for the creation of a trust; the intention only, will be regarded by a court of equity. *Fisher v. Fields*, on appeal, 10 Johns. Rep. 495. A trustee or *cestui que trust* will take a fee without the word *heirs*, when a smaller estate will not satisfy the object of the trust. And so, an assignment of a trust, carries a fee to the assignee, though it contain no words of inheritance, if such appear to have been the intent of the parties. *Fisher v. Fields*, *ut supra*.

(2) The rights and interest of the *cestui que trust*, in the trust estate, cannot be impaired or destroyed by any voluntary act of the trustee. *Shepherd v. M'Evers*, 4 Johns. Ch. Rep. 136. Nor will the trust property vest in the representatives of the trustee, so long as it can be traced and distinguished. *Moses v. Murgatroyd*, 1 Johns. Ch. Rep. 119. Nor will such rights be affected by the bankruptcy of the trustee. *Dexter v. Stewart*, 7 Johns. Ch. Rep. 52.

suffered by a *Cestui que Trust* in Tail, in possession, bars all equitable Remainders depending upon such Estate, Tail (b), although there was no legal Tenant to the Præcipe (c), for otherwise, Trustees refusing, or incapable of executing their Trust, might hinder the Tenant in Tail of that liberty to dispose of his Estate, and bar the Remainders which the Law gives him as incident to his Estate, which would be manifestly inconvenient, and tend to the introduction of Perpetuities *(d). But [*454 an equitable Recovery does not bar a *legal* Remainder. To bar *legal* Remainders, by common Recovery, there must be a *legal* Tenant to a Præcipe (e); nor will such a Recovery be efficient if there be an Estate for Life in another prior to such Estate-Tail (f), or if the Estate for Life be *equitable*, with a *legal* Remainder in Tail (g); but it seems an equitable Recovery is good although the Equitable Tenant to the Præcipe has also the legal Estate (h).

It is doubtful whether there can be an *equitable disseisin*, so as to prevent an equitable Tenant in Tail suffering an equitable Recovery (i).

According to the old practice of the Court, at least down to the time of *Lord Guilford*, a Recovery of an equitable Estate was not necessary, but it might be barred by Deed (k). And it has been holden that the Tenant in Tail of an equitable Estate might, by bare articles (l), or by a Devise (m), or Feoffment (n), or Bargain and Sale (o), bar the Entail; but *Lord Hardwicke* expressly decided to the contrary, and held that a Tenant in Tail of a *Trust Estate with Remainders over, cannot by Will [*455 or Settlement bar the Remainders without a Recovery, any more than Tenant in Tail of a legal Estate (p); and upon its being urged that a Lease and Release would bar an equitable Entail, *Lord Hardwicke* said, "It never was so determined, and I hope never will (q)."

The *Cestui que Trust* may devise the Trust Estate (r); by his

(b) 1 Chan. Cas. 49. 2 Ch. Cas. 64, &c. 2 Ventr. 350.

(c) North v. Way, 1 Vern. 13; and see Barnaby v. Griffin, 3 Ves. 276, 7. North v. Champernon, 2 Chan. Cas. 63. 78.

(d) See the terms of the Decree in North v. Champernon 2 Cha. Cas. 78.

(e) Robinson v. Cumming, For. 164. S. C. MS. 1 Atk. 473. Selwyn v. Thornton, Amb. 545. 699; and 1 Bro. C. C. 73, in note. Botteler v. Allingham, 1 Bro. C. C. 72.

(f) North v. Champernon, 2 Ch. Cas. 63. 78.

(g) Shapland v. Smith, 1 Bro. C. C. 74. Robinson v. Cumming, 1 Atk. 473.

(h) See this point discussed, Sugd. Vend. and Purch. 287.

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(i) Eord Grenville v. Blyth, 16 Ves. 224.

(k) Fletcher v. Tollet, 5 Ves. 12, 13.

(l) Bates v. Bayley, 2 Vern. 226.

(m) Blake v. Luxton, 6 T. R. 289.

(n) 2 Chan. Cas. 64. Otway v. Hudson, 2 Vern. 583. Woolnough v. Woolnough, Pre. Ch. 228. 1 Vern. 14.

(o) North v. Way, 1 Vern. 14. 2 Chan. Cas. 64; and see 2 Ventr. 350.

(p) Kirkham against Smith, Amb. 518. S. C. 1 Ves. 260; and see 2 Vern. 552. Legate v. Sewell, 1 P. Wms. 91. Barnaby v. Griffin, 3 Ves. 277. Tollet v. Fletcher, 5 Ves. 13.

(q) Kirkham v. Smith, 1 Ves. 260. S. C. Amb. 518.

(r) Greenhill v. Greenhill. 2 Vern. 690.

Treason (s), or *Felony (t)*, he forfeits it. It is subject to an *Extent (u)*, (unless it be a Trust of a term of years,) and it may be taken in *execution (x)*. If the equitable Title is not acted upon in the same time the legal Title should, it is barred (*y*).

So Trust Estates *descend* in the same manner as legal Estates do, whether Customary, (as Borough English, or Gavel-kind) or otherwise (*z*): and there may also be a *possessio fratris* of a Trust (*a*), as by the Common Law there was of an Use (*b*).

The Power of the Trustee over the legal Estate vested in him exists only for the benefit of the *Cestui que Trust*. (1) He may, indeed, by means of that power, prejudice the *Cestui que* *456] *Trust*, by *alienating* *the Estate, either wholly or partially,

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| (s) See 33 Hen. 8. c. 20. s. 2. | 145. Andrew v. Wrigley, 4 Bro. C. C. |
| (t) Hob. 214. Hard. 490. | 195. Townshend against Townshend, |
| (u) Hard. 495. | 4 Bro. C. C. 138. |
| (x) See 29 Car. 2 c. 3. s. 10. | (z) Banks v. Sutton, 2 P. Wms. 713. |
| (y) Medlicot v. O'Donel, 1 Ball & Beatty, 167. Hovendon v. Lord Annesley, 2 Sch. & Lefr. 630. Bonny v. Ridgard, 4 Bro. C. C. 138. S. C. 1 Cox, | Fawcett v. Lowther, 2 Ves. 304; and see 2 P. Wms. 736. |
| | (a) 2 P. Wms. 713. 736. |
| | (b) Corbet's Case, 1 Rep. 88a. |

(1) A trustee cannot act for his own benefit in a contract relating to the subject of the trust. *Green v. Winter*, 1 Johns. Ch. Rep. 27. *Parkist v. Alexander*, 1 Johns. Ch. Rep. 394. Thus, where the trustee buys up encumbrances on the trust estate, at a discount, the purchase will enure to the benefit of the *cestui que trust*. *Green v. Winter*, *ut supra*. *Mathews v. Dragaud*, 3 Des. 28. *Van Horne v. Fonda*, 5 Johns. Ch. Rep. 388.

Nor will a trustee be permitted to make any gain, profit or advantage, from the use of the trust funds. *Schieffelin v. Stewart*, 1 Johns. Ch. Rep. 620. *Brown v. Rickets*, 4 Johns. Ch. Rep. 303. *Hart v. Ten Eyck*, 2 Johns. Ch. Rep. 104. *Van Horne v. Fonda*, *ut supra*.

So, as a general rule, a trustee shall not be allowed to purchase the trust estate, for his own benefit. *Green v. Winter*, *ut supra*. *Evertson v. Tappen*, 5 Johns. Ch. Rep. 497. *Hawley v. Mancius*, 7 Johns. Ch. Rep. 174. *Munro v. Allaire*, on appeal, 2 Caines' Cas. in Error, 183.

If a trustee, mortgagee, executor, &c. having a limited interest, gains any advantage by being in possession, or otherwise, in obtaining a new lease, he cannot retain it for his own benefit, but must hold it for the *cestui que trust*, &c. *Holbridge v. Gillespie*, 2 Johns. Ch. Rep. 30.

So, where a trustee sells the trust estate, and becomes interested in the purchase, the *cestui que trusts* are entitled, as a matter of course, to have the purchase set aside, and the property re-sold under the direction of the court. *Davoue v. Fanning*, 2 Johns. Ch. Rep. 252. And it can make no difference in the application of the rule above stated, that the sale was at auction, *bona fide*, and for a fair price, and that the trustee did not purchase for himself, but a third person, by a previous arrangement, became the purchaser, to hold in trust for the separate use of the trustee's wife, who was one of the *cestui que trusts*. *Davoue v. Fanning*, *ut supra*. *Vide contra, ut semb.* *Bergen v. Bennett*, 1 Caines' Cas. in Error, 1. But, it seems, that where the purchase is made by a trustee, with the assent of the *cestui que trust*, it shall be deemed to be valid. *Hendricks v. Robinson*, 2 Johns. Ch. Rep. 311.

So, where a mortgage contains a power of sale, on default of payment, the mortgagee, himself, may, make a *bona fide* purchase. *Bergen v. Bennett*, *ut supra*.

Where a trustee, pending a suit against for a breach of trust, fraudulently sells the trust estate, and assigns the securities taken for the purchase money, the *cestui que trust* may either disregard the sale, and take the land, or he may affirm the sale, and take the securities; but he cannot have both. *Murray v. Lyburn*, 2 Johns. Ch. Rep. 441.

(as by a Mortgage) (c) to a purchaser for a valuable consideration, (a *voluntary* Conveyance would have a different effect) (d); but such an abuse of Trust can hardly occur, unless where a Trustee is in possession of the Trust Estate and of the Title Deeds, and even then very rarely (1). But a Judgment, or a Commission of Bankruptcy against him (e) (2), will not in Equity affect the Estate; nor can his Wife claim *Dower* or *Free-bench* out of it (f); nor can the Husband of a Female Trustee be entitled as Tenant by the Curtesy (g).

It has been doubted whether a Trustee will by *Treason* or *Felony* forfeit the Trust Estate; and it has been questioned whether, supposing a Forfeiture, the Lord who claims by Escheat, or the Crown claiming by that Title is bound by the Trust (h). *By a very recent Statute (i), however, it is [*457 provided, that where Trust Property escheats to the Crown, His Majesty may direct the execution of the Trusts, and may make Grants to Trustees for that purpose, or may make Grants to any persons for the purpose of restoring the same to any of the family of the Persons whose Estates the same had been, or of rewarding any Persons making discovery of the Escheat; but it does not determine in what cases Lands escheat; for-escheat, it must be remembered, may be *ob defectum tenentis*, as well as *pro delicto tenentis*.

(c) *Finch v. Earl of Winchelsea*, 1 P. Wms. 279.

(d) *Pye v. George*, 1 P. Wms. 128.

(e) *Finch v. Earl of Winchelsea*, 1 P. Wms. 278. *Beonett v. Davis*, 2 P. Wms. 318. 3 P. Wms. 187. note A. quot. 1 Sand. on Uses, 279. 238; and see *Medley v. Martin*, *Finch*, 63.

(f) *Hinton v. Hinton*, 2 Ves. 634. 638. *Noel v. Jevon*, 2 Freem. 43. *Bevant v. Pope*, 2 Freem. 71, quot. 1 Sand. on Uses, 279.

(g) *Casborn v. Inglis*, 1 Atk. 603. S. C. 2 Eq. Abr. 728.

(h) In *Comyn's Digest*, Tit. Forfeiture, B. 1, it is said the Lands are not forfeited; but in *Wike's Case*, Lane, 54 Jenkins's 190. Cas. 92. Hard 466.

Brooke, Feoffment al. Uses, pl. 31. Vin. Abr. Uses, pl. 4, in note, quoted 2 Fonbl. Treat. Eq. 168, in the notes, it seems to have been taken for granted; and the only question was, whether the Crown was bound by the Trust, which was decided in the negative; but as to that see *Reeves v. Attorney-general*, 2 Atk. 223. *Attorney-General and Du Plessis*, 2 Ves. 286. *Geary v. Bearcroft*, Carter, 67. *Eales v. England*, Prec. Chan. 200. 1 Eq. Abr. 384, in note. *Burgess and Wheate*, 1 Bl. Rep. 123. *Middleton v. Spicer*, 1 Bro. C. C. 201. *Pawlett v. Attorney-General*, Hard. 469; and 1 Ves. 446.

(i) 39, 40 Geo. 3 c. 88. s. 42.

(1) Where the father contracted for the purchase of a tract of land from a third person, in trust for his son, it was resolved, that the son, thereby, acquired an interest in the land, which could not be diverted or varied by any subsequent agreement or act of the father and the vendor. *Taylor v. James*, 4 Des. 1.

(2) Vide *Dexter v. Stewart*, 7 Johns. Ch. Rep. 52.

Property held in trust, will not pass to the representatives of the trustee; but so long as it can be traced and distinguished, it enures to the benefit of the *cestui que trust*. *Moses v. Murgatroyd*, 1 Johns. Ch. Rep. 119. Vide *Bethel Church v. Donnom*, 1 Des. 154. Nor will the voluntary act of the trustee, impair or destroy the vested interest of a *cestui que trust*; but the trust will follow the land into the hands of the person to whom it may have been conveyed by the trustee, with knowledge of the trust. *Shepherd v. M'Evers*, 4 Johns. Ch. Rep. 136.

A Trustee may devise the Trust Estate, but the Devisee takes the Estate subject to the original Trust (*k*). But though, even under general words (*l*), the Trust Estate may be devised, yet wherever the Trusts under which the Trustee's Property is devised are inconsistent with the supposition that the Trust Estate was meant to be included in the Devise, it will be presumed it was not intended to pass, and will not pass (*m*); as, if a man should generally devise his Lands after payment of his Debts and Legacies, his Trust Estates would not pass, for it is clear he could only mean Lands which he could subject to the payment of his Debts (*n*).

It is observable, that by whatever means, whether by Conveyance or otherwise, a person obtains the absolute Ownership at *458] Law of the Estate, though he *acquired that by an equitable Title, and both either come together, or are afterwards united in him, the legal Estate will prevail, and the equitable Estate is totally gone for the purpose of being acted upon in a Court of Equity (*o*).

If a legal and equitable Estate descend in Fee Simple to the same Person, the one from the paternal, the other from the maternal, line, there is an end of the Trust, and he may dispose of the whole as he pleases, for a man cannot be a Trustee for himself; nor will the Trust and legal Estate open on his death, and be served for different heirs, but having once joined, they go according to the legal Estate (*p*).

It may also be remarked, that where Property is bequeathed in Trust, but no Trustee is appointed, the Court in the case of *Real Estate* considers the *Heir at Law* as a Trustee; and in regard to *Personal Estate* considers the *personal representative* as a Trustee, and will, itself, see to the execution of the Trust (*q*).

Where an Estate, for instance, is devised in Trust to a Body Corporate, which by the Statute of Mortmain cannot take, the Uses are not defeated by this deficiency of the Trustees, but attach upon the Estate the Law raises, and the Heir at Law becomes a Trustee to the Uses of the Will (*r*). So if a Power be given by will for the Devisees for Life when in Possession to cut down Timber, as four Trustees, or the Survivors or Survivor of *459] them, should assign, *allow of or direct, and all the four Trustees die, the Court will execute the Trust by referring it to

(*k*) Lord Braybroke v. Inskip, 5 Ves. 417. Marlow and Smith, 2 P. Wms. 500.

(*l*) Marlow v. Smith, 1 P. Wms. 97. 1 Atk. 605, in note.

(*m*) See Lord Braybroke v. Inskip, 5 Ves. 435. Reade v. Reade, 8 T. R. 118. which cases overrule Attorney-General v. Buller, 5 Ves. 339. and what is said 2 Bro. C. C. 198.

(*n*) Compton against Compton, 9 East, 273; and see the cases in the preceding note.

(*o*) Selby v. Alston, 3 Ves. 342.

(*p*) Dougl. 771.

(*q*) Vid. White v. White, 1 Bro. C. C. 12. Pit v. Pelham, Dom. Proc. 1 Chan. Rep. 288.

(*r*) Souley v. Maister, 1 Bro. C. C. 81.

the Master, to see what Timber was fit to be cut down from time to time (s). So where a Power of selling Lands is given to two Executors, it has been much questioned whether if one dies the surviving Executor can execute the Power ; or whether, if both die, the Power of selling passes to their Executors or Administrators ; but though in either of these cases the Power becomes, in strictness of Law, extinct, a Court of Equity will consider the Person in whom the Land becomes vested as a *Trustee*, and compel the performance of the Trust. This is a consequence of the general rule before adverted to, that *a Trust shall never fail of execution for want of Trustee ; and that if one is wanting a Court of Equity will execute the Trust* (t). Where Trustees refuse to act the Trust devolvee upon the Court (u).

Having made these few brief observations upon the general nature of Trusts, and limited the bounds of our Inquiry, we may proceed to consider,

I. *Express Trusts created by Deed.*

THE conveniences and necessities of Mankind daily give rise to a vast variety of express Trusts created by Deed ; nor is it here pretended to enumerate all of them, but only such as are of the most importance, *and in common use : such as 1, [*460 Trusts created in *Marriage Settlements* of real or personal Property—2, In Conveyances to *Purchasers*—3, In Conveyances by way of *Mortgage* or otherwise, for the *payment of Debts* ; and 4, In Assignments of *Choses in Action*.

1. *Settlements* may be made either of Real or Personal Property, or both ; and, subject to the rules by which the boundaries of Limitations and Accumulations of Personal Property are fixed (x), a Settlement may be made according to the pleasure of the Settler. Personal Estate may by a careful Settlement, be rendered unalienable as long as Real Estate.—*Terms for Years*, or

(s) *Hewitt v. Hewitt*, 2 Eden's Rep. 332.

(t) See Co. Litt. 113a, note 2, and the Cases there cited.

(u) *Doily v. Sharrant*, MS. Mich. 9 Geo. 2. 1735. S. C. 4 Vin. Abr. 485 ; but differing in some particulars ; and see S. C. quoted 2 vol. Fonbl. Trea. Eq. 216. *Lewis v. Lewis*, 1 Cox, 162.

(x) See 39 and 40 Geo. 3. c. 99, an Act, wrongly attributed to Lord Eldon ; see 11 Ves. 148. Previous to this act of Parliament a person might, by executory Devise, dispose of his property, and the accumulation of rents and profits for a life or lives in being, and twenty-one years, and a small portion of time, the period of gestation. This was one of the points determined in the

great case of *Thelluson v. Woodford*, 4 Ves. 227 ; in other words, he might order an accumulation to go on during that period of time which the Law permits the Estate to be unalienable ; but by that Act the period of accumulation is limited.

A Trust by Will, for accumulation beyond the time allowed by the Statute, is void only for the excess. Where, therefore, the accumulation was directed to be during a life, it was held not to be void under that Statute, but to be good for twenty-one years, if the Life so long continued, and only void for the excess, that is to say, for so long as the Life continued after that period. *Griffiths v. Vere*, 9 Ves. 131 ; and see *Longdon v. Simpson*, 12 Ves. 295.

Personal Chattels, may be limited or devised in *strict Settlement* to one for Life, and afterwards to Sons and Daughters in Tail (y), and may be rendered transmissible as *Heir Looms* are; but such Property cannot be made unalienable longer than Lives in *461] being, and twenty-one years after, or *in the case of a *posthumous Child*, a few months more (z). If the executory Limitations of Personalty are on Contingencies too remote, the whole Property is in the first taker; and whatever words would *directly* or *constructively* (a), give an *Estate-Tail* (b) in *Land*, will give the absolute Property in *Personal Estate* (c), because no Recovery could be suffered of such an Entail (d). In one case, however, it was held, that this does not apply in cases where, against the common import of the words, an *Estate-Tail* is raised by an ingenious construction of a Will, to effectuate the general intention (e).

Estates *pur autre vie* may be devised or limited in *strict Settlement* by way of *Remainder*, like Estates of Inheritance (f); but such as have Interests in the nature of Estates-Tail may bar their Issue, and all Remainders over, by *alienation* of the Estate *462] *pur autre vie*: nor is the having of Issue necessary to the giving effect to such Alienation (g).

An *Annuity* cannot be entailed. When granted with words of Inheritance, it is descendible; but as to its security is personal only: it may be granted in Fee; of course it may as a qualified or conditional Fee, which must end or become absolute in the Life of a particular person; but it cannot be entailed, and consequently there can be no Remainder of it, for there can be no Remainder of Property which is not within the Statute *de Donis* (h).

Where *Leasehold Estate* is intended to be settled with *Real Estate*, the mode of doing it is either by special limitations (i),

(y) Vid. Har. Co. Lit. 18 b. n. 7. 20 a. n. 5.

(z) Sheffield v. Orrery, 3 Atk. 287. Higgins v. Dowler, 2 Vern. 600; but this latter case is incorrectly reported as noticed in Clare v. Clare, MS. Stanley v. Leigh, 2 P. Wms. 618. S. C. MS. The mode of settling terms is stated in that case. Sabbarton v. Sabbarton. For. 55. S. C. MS. and see Cambridge v. Rous, 8 Ves. 24.

(a) Britton v. Twining, 3 Meriv. 783.

(b) Jacobs v. Amyatt, 4 Bro. C. C. 543; S. C. 1 Madd. Rep. 376. in note. Lee v. Audley, 1 Cox, 324.

(c) Tatton v. Molineux, Pollex. 24. Moore, 809. Ivie v. Ivie, 1 Atk. 430. Daw v. Lord Chatham, 7 Bro. P. C. 453. Toml. Edit. when before the Master of the Rolls, 1 Madd. Rep. 488. Butterfield v. Butterfield, 1 Ves. 133. S. C. Fearn on executory Devises, 464,

5. 6th Edit. Glover against Strothoff, 2 Bro. C. C. 33. Chandless v. Price, 3 Ves. 99, more fully stated 13 Ves. 479, in note. Barlow v. Salter, 17 Ves. 479. Don v. Perry, 1 Meriv. 20. Brounker v. Bagot, Ibid. 271; and see Bradley v. Peixote, 5 East 183. Elton v. Eason, 19 Ves. 73.

(d) Fordyce v. Ford, 2 Ves. 539.

(e) Chandless v. Price, 13 Ves. 580, in note.

(f) Low v. Burrow, 3 P. Wms. 262.

(g) Harg. Co. Litt. n. 5. Hodgson v. Bussey, 2 Atk. 82. Read v. Snell, 2 Atk. 642. Sabbarton v. Sabbarton, For. 245; and see ex parte Sterne, 6 Ves. 159.

(h) Turner against Turner, 1 Bro. C. C. 324, 5.

(i) As in Pelham v. Gregory, 5 Bro. C. C. 435.

or, if general words are preferred, the Deed directs that it shall go along with the Real Estate, as long as the rules of Law and Equity will permit it to be enjoyed with the Real Estate; that is, until a Recovery can be suffered, viz. till the age of twenty-one of the Tenant in Tail; but the Rule of Law will not allow it to go farther; whereas the other will go until a Recovery is suffered (k).

Where there was a Covenant in a Marriage Settlement to settle *Leasehold* Estates in Trust for such Persons, and such or the like Estates, Ends, Intents and Purposes, as far as the Law will allow, as were declared concerning Real Estates limited by the same Settlement to the first and other Sons in Tail Male with Remainders, the Court executed the Covenant *by or- [*463 dering a Settlement to be made of the Leasehold in analogy to the Freehold; so that no child born and not attaining the age of twenty-one, should by his birth attain a vested Interest, transmissible to his Representatives (l); but according to some decisions (m) such a Settlement would not be correct; and Lord Eldon seems to have thought that the method of limiting a term alluded to in *Stanley and Leigh* (n), and followed in the *Duke of Newcastle's* Case, is not the mode in which such a Covenant in a Marriage Settlement ought to be exercised, because in the event of a Son dying under twenty-one having Issue Male, the Freehold Estate would go to such Issue, and the Leasehold Property would go to others, and thus the two Estates would be separated, contrary to the intention of the Settlement (o).

The exigencies of Families give rise to various forms of Settlement; nor is it here intended to notice all the variety of Trusts that are to be found in *Settlements, but only some [*464 of those that are usually resorted to.

In the ordinary Settlements of Real Estate in strict Settlement by the intended Husband, a Trust is usually created to secure a Rent-charge to the intended Wife, for her Life, in case she survives her Husband, in bar of Dower. If the intended Husband has no *Real* Estate on which to charge a Jointure, a sum of Money is, in general, invested in the Funds, in the name of Trus-

(k) *Watkins v. Lea*, 6 Ves. 641.

(l) *Duke of Newcastle v. Countess of Lincoln*, 3 Ves. 387; and see *Burchell v. Crutchley*, 15 Ves. 553. As to the mode of thus settling Terms for years, see *Stanley v. Leigh*, 2 P. Wms. 690. S. C. MS. and what is said by Lord Ellenborough, 12 Ves. 225. The decision in the *Duke of Newcastle v. Countess of Lincoln* was varied on appeal to the House of Lords, *Vid.* 12 Ves. 218; but when the appeal was heard, the Duke of Newcastle had attained twenty-one, and it therefore became unnecessary to

decide what would have become of the property if the Duke had died under age leaving Issue. Alluding to the decision in the House of Lords, Lord Eldon, in a subsequent Case, (*Burrell v. Crutchley*, 15 Ves. 553,) observed, that he did not take it to have decided any thing with regard to any case that may probably arise, except that precise case.

(m) *Vid.* *Foley against Burnett*, 1 Bro. C. C. 275; and *Vaughan v. Burslem*, 3 Bro. C. C. 101.

(n) 2 P. Wms. 686.

(o) See 12 Ves. 228.

tees, in Trust, upon the Husband's death to pay the Wife the Dividends.

Settlements in cases of Infancy have already been adverted to.

As a Woman may by Agreement, or Composition before Marriage, bar herself of her customary Share (o), or her Thirds (p), so it is a rule that where a Wife has compounded with her Husband, he is considered in regard to the custom, as leaving no Wife (q), and not as a purchaser of her Third (r).

So if a Husband covenant to release the orphanage Share of his intended Wife, this operates as an extinguishment of the Wife's right to the orphanage part (s).

And if a Freeman of London, before Marriage, settles part of his Personal Estate upon his intended Wife, to take effect after *465] his death, without mentioning *it to be in bar of her customary part, this will bar her of such customary part (t); but a *Jointure* made by a Freeman to his Wife, and expressed to be *in bar of Dower*, will not bar the Wife's claim to a customary share (u).

Where a Provision for a Wife, in articles before Marriage, was declared to be in full satisfaction of Dower, or any claim or right by Common Law, Custom of the City, or any other Law or Usage notwithstanding, this was held to bar the Wife from claiming under the *Statute of Distributions* (x); and, it seems, it would preclude her from claiming her *Paraphernalia* under the *Custom of London* (y).

Provisions made by Settlements, though not expressed to be in bar of Dower, amount frequently to an implied bar. A Provision for instance, by Covenant in a Marriage Settlement, has been holden to amount to an implied bar of Dower (z). And where a Husband covenants to leave, or to pay at his death, a Sum of Money to a Person, who, independently of that engagement, by the relation between them, and the provision of the Law attaching upon it, would take a Provision, the Covenant is to be construed with reference to that; and the Court will not look upon the slight difference between *leaving* and *paying*, or whether payment is to be within three, or six Months (a).

*466] *It has been generally laid down that in all cases where a Husband makes a settlement of his own Estate on his Wife, in consideration of her Fortune, the Wife's Portion, though consisting of *choses in action*, and though there be no particular

(o) *Blunden v. Barker*, 1 P. Wms. 633. S. C. 10 Mod. 451. *Read v. Snell*, 2 Atk. 644.

(p) *Glover v. Bates*, 1 Atk. 439.

(q) 2 Atk. 644; and see *Love v. —*, 1 Vern. 6.

(r) *Druce v. Dennison*, 6 Ves. 393. *Morris v. Burroughs*, 1 Atk. 403.

(s) *Ives v. Medcalf*, 1 Atk. 64.

(t) *Lewis v. Lewis*, 3 P. Wms. 15.

(u) *Babbington v. Greenwood*, 1 P. Wms. 530. S. C. Pre. Ca. 505.

(x) *Glover v. Bates*, 1 Atk. 439; and see *Benson v. Bellasis*, 1 Vern. 15.

(y) *Read v. Snell*, 2 Atk. 642. *Benson v. Bellasis*, 1 Vern. 15.

(z) *Vid. Garthshore v. Chaffie*, 10 Ves. 20.

(a) *Ibid.* 10 Ves. 13; but see *Kirkman v. Kirkman*, 2 Bro. C. C. 95.

Agreement for that purpose, is considered as *purchased* by him, and will go to his Executors (b); but later Cases seem to establish, that the Husband does not by a Settlement become a Purchaser of the Fortune that may *afterwards* come to his Wife, if the Settlement be expressed, or imports to be (c), in consideration of her Fortune as specified and described in the Deed itself; and Property afterwards coming to her, and not reduced into Possession by the Husband, would survive to her (d); but if the Settlement is in consideration of the Fortune *she is*, or *may be*, entitled to (e), or the contents of the Settlement plainly import that, as much as if it was expressed; in such case if any thing comes afterwards, during the Coverture, to the Wife, the Husband is considered as a *Purchaser*, and takes it.

If there be a Covenant, merely that the Wife shall dispose of her personal Estate, this does not extend to what shall come to her after Marriage (f).

Where there is an Agreement between Husband and Wife before Marriage, that the Wife shall have *to her separate [*467 use either the whole or particular parts of her *personal Estate*, she may dispose of it by an act in her Life, or by Will, and she may do it by either, though nothing is said of the manner of disposing of it. It is different as to *real Estate*, for that will descend to her Heir at Law, and that more or less beneficially, for the Husband may be Tenant for Life if they have Issue; otherwise not; but still it descends to her Heir at Law. A Woman, however, on her Marriage, may, without fine, dispose of her real Estate, and prevent its going to her Heir at Law, but that, it seems, can only be done by way of Trust, or Power over an Use. (1) In

(b) *Cleland v. Cleland*, P.-e. Ch. 63. *Blois v. Martin*, 2 Vern. 501. *Packer v. Wyndham*, Prec. Ch. 412; and see note D. to 3 P. Wms. 199.

(c) *Carr v. Taylor*, 10 Ves. 579.

(d) *Salwey against Salwey*, Amb.

692. *Garforth v. Bradley*, 2 Ves. 677.

(e) *Mitford v. Mitford*, 9 Ves. 95, 6.

(f) *Pilkington v. Cuthbartson*, Dom. Proc. 11 March 1711. Lord Hartcourt's MS. Tables.

(1) A woman, in contemplation of marriage, conveyed all her estate real and personal, to trustees, to her separate use, until the marriage should take place, and after the marriage, to the use of such persons, and for such estates, as she, with the consent of her intended husband, should by deed attested by two witnesses, or by her last will and testament, limit and appoint, to enable her to take the profits thereof, free from the control of her husband, and at her absolute disposal; and afterwards, subsequent to her marriage, in execution of the power reserved to her in the deed of settlement, with the approbation of her husband, conveyed her real estate in fee. upon trust; and also, soon afterwards, by her last will and testament, after giving certain specific legacies, bequeathed all the residue of her estate to the *cestuis que trust*: It was resolved, under these circumstances, that the wife was to be regarded as a *feme sole*, and that the disposition of her separate estate, having been made in pursuance of the power reserved to her in the deed of settlement, was valid, and such as a court of equity ought to protect. *Jaques v. Methodist Episcopal Church*, on appeal, 17 Johns. Rep. 548. But vide contra, S. C. 1 Johns. Ch. Rep. 450. 3 Johns. Ch. Rep. 77. And, it seems, that though a particular mode of disposition be pointed out in the deed of settlement, it will not preclude the wife from adopting any other mode of disposition, unless she

the first instance, suppose a Woman having a real Estate before Marriage, and either before or after Marriage, by a proper Conveyance (if after Marriage it must be by Fine) Conveys it to Trustees in Trust for herself during her Coverture, for her separate use, and afterwards that it shall be in Trust for such Person as she shall by any Writing under her hand and seal, or in nature of a Will, appoint, and in default of Appointment to her Heirs, and she makes such an Appointment, that will be a good declaration of the Trust, and the Heir at Law would be remediless (g). For though, in the notion of the Law, a Wife cannot make a Will (h), yet where she has a separate Power over her Estate she may dispose of it by Will, (i) and it must be propounded as *468] a Will in *the Spiritual Court (i); and if the Wife has not appointed an Executor the Court will grant Administration to the Husband, with the Paper or Testamentary Schedule annexed (k). Whoever takes under such Will takes by virtue of the execution of the Power, and by the Power coupled with the

- (g) *Peacocke v. Monk*, 2 Ves. 180. 627.
Wright against Englefield, Amb. 468. (i) See *Henley v. Phillips*, 2 Atk. 48.
Wright v. Cadogan, Amb. 469. 2 Eden, (k) *Ross v. Ewer*, 3 Atk. 156. 160.
 239. 6 Bro. P. C. 156. *Dillon v.* 162. The rule is the same at Law. See
Grace, 2 Sch. & Lefr. 463. *Stone v. Forsyth*, Dougl. 707, and the
 (h) See *George against* — Amb. cases cited in the note to that case.

he restrained by the words of the instrument from resorting to any other mode than the one specified. *Ib.* *Vide contra*, S. C. 3 Johns. Ch. Rep. 77.

In the same case, reported in 3 Johns. Ch. Rep. 77, the chancellor, after a very full examination of the *English* decisions, on the question, how far the wife was to be considered as a *feme sole*, in relation to her separate estate, concluded, that these decisions were so fluctuating and contradictory, as to leave the court at liberty to adopt the true principles of these settlements, which he stated to be, that the wife, as to her separate property, is to be deemed a *feme sole*, to the extent only of the power reserved to her in the marriage settlement; and that the disposition of the property secured to her, must be in strict pursuance of such power: Therefore, when she has a power of appointment by will, she cannot appoint by deed; nor, when she is empowered to appoint by deed, the making a bond, note, or parol promise, without reference to the property, or a parol gift of it, is not such an appointment; nor, where it is provided, in the settlement, that she is to receive from the trustee the income of her property, as it may, from time to time, become due, she has no power, at once, to dispose of the whole income, by anticipation. But the decision of the court of errors, S. C. 17 Johns. Rep. 548, does not confirm these restrictions farther than they are specified, in express terms, in the deed of settlement.

In *South Carolina*, the power of a *feme covert* over her separate estate, is more restricted than it would seem to be by the late *English* decisions. *Vide Ewing v. Smith*, 3 Des. 417.

Where a *feme covert*, on her marriage, conveyed her estate to trustees, to the use of her husband during their joint lives, and upon her death, to the use of such persons as she, by deed or will, should appoint; it was held, that she had not such a separate estate, *in presenti*, as to make her a *feme sole*, so that she could charge her separate estate, by joining her husband in a bond for the payment of money. *Bethune v. Beresford*, 1 Des. 174. 178.

(1) And a *feme covert*, by a will in favour of her husband, may execute a power given or reserved to her, *dam sola*, over her real estate; and her heirs at law may be compelled to convey the legal title to the devisee. *Bradish v. Gibbs*, 3 Johns. Ch. Rep. 523.

Writing, and as if the limitation in that Writing of Appointment had been contained in the Deed creating the Power. But notwithstanding that, and though such writing is not a proper Will, it has the effect and consequence of a will to three intents: First, the words are to have the like construction as if it was a proper Will; Secondly, such Will is ambulatory until the death of the Testatrix, (1) and therefore, though the party taking thereby, takes by virtue of and under the Power, yet, notwithstanding that, such Appointee must survive the Testatrix before he can take; Thirdly, if he does survive the Testatrix, he can take only from the time of the death of the Testatrix, and does not take as from the time of the Power (l).

So the Wife may dispose of her Estate by way of Power over an Use; as, if she conveyed the Estate to the Use of herself for Life, Remainder to the use of such persons, as she by any writing, &c. should appoint, and in default of Appointment, to her own right Heirs; this is a Power reserved to her, and she may execute the same (m). (2)

*But a Feme Covert cannot, it seems, bar her Heir by [*469 a bare Agreement, without doing any thing to alter the nature of the Estate (n). "Suppose," says Lord Hardwicke, "a Woman having a Real Estate before Marriage, in consideration of that Marriage enters into an Agreement with her Husband, that she may, by Writing under her hand, executed in the presence of Witnesses, or by Will, dispose of her real Estate, will this bind the Heir at Law? It rests in Agreement; and if she does it, though it may bind her Husband from being Tenant by the Curtesy, that arises from his own Agreement; but what is that to the Heir at Law? Still she is a Feme, under the disability of Coverture at the time of the act done; and if she attempts to make a Will the Instrument is invalid. The only question that could arise would be, whether such an Agreement between her and her Husband would not give her a right to come into a Court of Equity after the Marriage, to compel that Husband to carry this into execution, and to join with her in a Fine to settle the Estate, either on such Trusts, or to such and such Uses; and if it is such an Agreement as the Court would decree, to be further carried into execution by a proper Conveyance, then the question may be whether her Heir at Law is not to be

(l) Southby v. Stonehouse, 2 Ves. 610.

(m) See 2 Ves. 191. Travel v. Travel, 3 Atk. 711. Tomlinson v. Delighton, 1 P. Wms. 149. Barford v. Street, 15 Ves. 135. Irwin v. Farrer, 19 Ves. 96.

(n) See Hodson against Lloyd, 2 Bro. C. C. 543, 4. George v. — Ambl. 628; but see Rippon v. Dawdin, Ambl. 665; and Wright v. Englefield, Ambl. 468.

(1) Vide Bradish v. Gibbs, 3 Johns. Ch. Rep. 523.

(2) To enable a feme covert to dispose of her separate real estate, in equity, it is not necessary that the legal estate should be vested in trustees; but an antenuptial agreement that she shall have power to dispose of it, during coverture, will enable her to do so. Bradish v. Gibbs, *ut supra*.

bound by the consequences of that Agreement? But that is the only way in which it could be brought in. But if the Agreement *470] cannot be carried into execution, though *she might have power to bar her Husband, it being a voluntary claim for her, and the Law casting the descent on the Heir at Law, it seems it could not be done (o)."

If a Woman has a separate Estate in Land for Life, she may in Equity sell that Interest (p); but she cannot, it seems, by a parol promise charge her separate real Estate (q). (2)

HAVING thus noticed Settlements of Real Estate to the separate use of a Feme Covert, it may be an excusable digression to advert to the principles that have been laid down respecting separate personal Estate,—the manner in which it may be created otherwise than by Settlement,—and the dominion which the Wife possesses over such separate Property; as well as to notice those Settlements which Courts of Equity compel Persons to make who apply to them for their assistance to obtain Property in right of a Feme Covert. The Settlement which a Person clandestinely marrying an Infant Ward of Chancery is compellable to make, has already been considered (r).

By the strict Rules of the Common Law a Wife can have no separate Interest. Her Property, as well as her Person, is under the control of her Husband. There is, indeed, a notable exception in regard to the *Queen consort*, who, in respect to private rights, is considered as a distinct and separate person from his Majesty the King. She may sue and be sued alone, and in *471] her own name. She *can take directly by Grant from the King, or from any other Person, without any intervention of Trustees; and can execute a Bond or other Specialty, and may convey her Estate without his being a Party to such Security or Conveyance (s).

The strictness of the Common Law in regard to private persons has been much relaxed by the decisions of Courts of Equity; with what propriety, it is not here necessary to inquire.

By *Devise* a married Woman may acquire a separate Interest without the intervention of Trustees; and the legal Estate de-

(o) Per Lord Hardwicke in *Peacock* 2 Ves. jun. 608.

v. Monk, 2 Ves. 191; and see *Fettilplace*

v. Georges, 3 Bro. C. C. 10.

(p) *Parkes and Whites*, 11 Ves. 232;

and see what is said in *Burdon v. Dean*,

(q) *Clarke v. Miller*, 2 Atk. 379.

(r) *Ante*, p. 351.

(s) 1 Inst. 133a. 2 Roll. Abr. 213. 4

Co. 23b.

(1) So, a *feme covert* may mortgage her separate estate for her husband's debts; and she may execute a valid power to sell the mortgaged premises, in default of payment, pursuant to the statute. *Demarest v. Wynkoop*, 3 Johns. Ch. Rep. 129.

volving on the Husband he will be decreed to be a Trustee for the Wife (*t*); though *Lord Couper*, in the first Case on the subject appears to have expressed some doubts (*u*). Nor are technical words necessary in a Devise or Bequest to make it a separate Trust; for if Property is bequeathed to "*the separate Use of the Wife*" (*x*), or *for her Maintenance*, (*y*), or to the Husband, "*for the Livelihood of the Wife*," this has been held to make him a Trustee (*z*). So, a bequest, without the intervention of Trustees, to a married Woman, to *her sole and separate use* (*a*), or a Legacy to a Feme Covert, "*her receipt to be a sufficient discharge to the Executors*," makes the Husband a Trustee for her (*b*); and a present to the Wife by the Husband's *Father, or [*472 even by a Stranger, during the Coverture, has been considered as a Gift to her *separate use* (*b*). So where the annual produce of certain Property was directed to be paid "into the proper hands" of a married Woman (*c*); and where Property was conveyed by the Feme before Marriage to Trustees, "*for her own sole use and benefit*" (*d*), these expressions were held to pass a separate Estate. In general, however, it seems that to prevent the operation of the martial right over the Property of a married Woman, a clear intention that it shall be to her separate use must appear; (1) and therefore a mere Trust to pay the Interest to her for Life, without saying, to her separate use, is not sufficient; the mere intervention of Trustees never having had the effect of vesting a sole and separate interest in the Wife (*e*).

A personal Gift may be made to a Feme Covert without a power of disposition, or with a limited power (*f*); but personal Property, unless tied up, where it is enjoyed separately, will be so with all its incidents (*g*). It is a Rule, therefore, that a married Woman is to be considered as a Feme Sole in respect of her separate Property (*h*), except as to Contracts with the Trustee of her separate Estate, who is *not allowed to deal with [*473

(*t*) *Bennett v. Davis*, 2 P. Wms. 316. 199.

Parker v. Brooke, 9 Ves. 583.

(*u*) *Harvey v. Harvey*, 1 P. Wms. 124. S. C. 2 Vern. 659.

(*x*) *Parker v. Brooke*, 9 Ves. 583.

(*y*) Tot. 158.

(*z*) *Darley v. Darley*, 3 Atk. 399; but see the observations on this Case, 3 Bro. C. C. 383, where the Report is said to be incorrect, and the Decree contrary.

(*a*) Bunb. 187, 8.

(*b*) *Lee against Prieaux*, 3 Bro. C. C. 381.

(*b*) *Graham v. Londonderry*, 3 Atk. 393.

(*c*) *Hartley v. Hurle*, 5 Ves. 545.

(*d*) *Ex parte Ray*, 1 Madd. Rep.

(*e*) *Lumb v. Milnes*, 5 Ves. 517.

(*f*) *Wagstaff and Smith*, 9 Ves. 524. *Hyde v. Price*, 3 Ves. 437; and see *More v. Huish*, 5 Ves. 694.

(*g*) *Fettiplace against Georges*, 3 Bro. C. C. 10.

(*h*) *Hulme v. Tenant*, 1 Bro. C. C. 21, and the observations on that Case in *Nantes v. Corrack*, 9 Ves. 188. *Lillia v. Airey*, 1 Ves. jun. 272. *Pybus v. Smith*, 4 Bro. C. C. 346. *Peacock v. Monk*, 2 Ves. sen. 190. *Socket and Wray*, 4 Bro. C. C. 486. S. C. in note to 2 Atk. 50. *Heally v. Thomas*, 15 Ves. 596. *Wagstaff and Smith*, 9 Ves. 524. *Witts v. Dawkins*, 12 Ves. 501.

(1) Vide *Barrett v. Barrett*, 4 Des. 447.

her (h). Doubts, indeed, have recently been entertained (i), whether a Feme Covert can part with her separate Estate in favour of her Husband, but the opinion of *Lord Eldon* and of the Profession appears to be that she may; (l) and the Authorities (k) are to that effect. The Wife cannot, however, transfer to her Husband Personal Property settled in Trust for her, surviving her Husband, absolutely (l).

She may convey away her separate Estate, her Life Interest in Stock, for instance (m), nor is it necessary the Trustee should join in the Conveyance (n), unless his consent is expressly rendered necessary by the Instrument giving her that Property (o). The Court will never encourage the locking up of Property, which would be the case if separate Property could not be disposed of (p). She may grant an Annuity out of her separate *474] Estate (q), *or enter into a Note (r), Bill (s), Bond (t), Conveyance (u), or Agreement (x), as if she were a Feme Sole, and a Court of Equity will decree a satisfaction by the Trustees

(h) *Dalbiac v. Dalbiac*, 16 Ves. 123.

(i) By Vice Chancellor Leach, in some cases not yet decided.

(k) *Milnes v. Busk*, 2 Ves. jun. 498; and see *Pawlet v. Delaval*, 1 Ves. 518. 2 Ves. 679. *Ellis v. Atkinson*, 3 Bro. 565. In *Frederick v. Hartwell*, 1 Cox, 193, a Sum of Money in the Funds being given by Will to Trustees for the separate use of a Feme Covert, and to be subject to her appointment after her death; the Wife made an appointment of this Money to her Husband; and on a Bill filed by Husband and Wife against the Trustees to transfer this Fund, the Court, on examination of the Wife, decreed the same. See also what Lord Eldon says in *Parkes v. White*, 11 Ves. 222, &c. That a Feme Covert may enter into a Contract of which her Husband and herself are to enjoy the benefit. See *Masters v. Fuller*, 4 Bro. C. C. 19. S. C. 1 Ves. jun. 513. 2 Atk. 390. *Stamford v. Marshall*, 2 Atk. 69. *Wagstaff v. Smith*, 9 Ves. 524.

(l) *Richards v. Chambers*, 10 Ves. 530.

(m) *Chesslyn v. Smith*, 8 Ves. 183; and see *Brown v. Like*, 14 Ves. 302.

(n) 1 Ves. 518.

(o) *Pybus v. Smith*, 1 Ves. jun. 193, 4. *Essex v. Atkins*, 14 Ves. 547.

(p) *Stamford v. Marshall*, 2 Atk. 69.

(q) *Wagstaff v. Smith*, 9 Ves. 524. *Essex v. Atkins*, 14 Ves. 542, overruling *Mores v. Huish*, 5 Ves. 693. Where Money was given in Trust for a Feme Covert for Life for her separate Use, and after her death to her Children, it was held, that though she might contract to raise Money by Loan, she could not by way of Annuity for her own Life, it being too large an anticipation; and leave was given to redeem the Annuity from the beginning though made irredeemable. [*Caverly v. Dudley*, 3 Atk. 541.]

(r) *Bullpin v. Clarke*, 17 Ves. 365.

(s) *Stuart v. Lord Viscount Kirkwall*, 3 Madd. Rep. 387.

(t) 2 Ves. 193. *Norton v. Turville*, 2 P. Wms. 144; approved in *Socket and Wray*, in note, 2 Atk. 59; and reported 4 Bro. C. C. 426.

(u) 2 P. Wms. 144.

(x) *Master v. Fuller*, 1 Ves. jun. 513. S. C. 4 Bro. C. C. 19. *Grigby v. Cox*, 1 Ves. sen. 517.

(1) But it seems, that a gift of the wife's property to the husband, must be free, and not the result of flattery, force, or improper treatment: As, where the wife agreed to bear the expenses of the family establishment, the husband is not only not accountable for moneys received of the wife, and expended for that purpose, but is entitled to be allowed for all advances out of his own money for that object, and for the necessary repairs of her estate. *Jaques v. Methodist Episcopal Church*, on appeal, 17 Johns. Rep. 548.

out of her separate Property (y). (1) She may dispose of her separate Property by Will (z); but it has been recently held, that the separate Property of a Feme Covert is not subject to general demands upon her (a), without any charge on her part, either express or implied. There is no case, it seems, where a demand against a married Woman, arising out of a fraud, has been decreed to be satisfied *out of her separate Estate (b). [*475 In all cases where the separate Estate of the Feme Covert is sought to be charged, her Trustees must be parties to the Bill. There is no case in which a personal decree has been made against a Feme Covert. She may pledge her separate Property, and make it answerable for her engagements; but where her Trustees are not made Parties to a Bill, and no particular fund is sought to be charged, but only a personal Decree against her, the Bill is demurrable, and cannot be sustained (c).

Where Money was vested in Trustees, in Trust for Husband and Wife successively for Life, Remainder to the Children, and in default thereof to such Person as the Wife should appoint; a Deed of the Wife conveying this contingent Interest, was, upon a Bill filed for that purpose, established (d).

It is observable, that in most of these cases, illustrative of the absolute power of a Feme Covert over her separate Property, no examination in Court was deemed necessary, as it is where she is parting with an Equity (e). The Wife cannot by examination in Court exercise any greater or other power over her settled Property than is reserved to her by the Settlement (f). The contrary doctrine in **M'Cormic v. Butler* (g), has been [*476

(y) In *Briscoe v. Kennedy*, July 21, 1762, at the Rolls, MS. a Creditor of wife by Debt contracted before Marriage, was decreed a satisfaction out of her separate Estate after the Outlawry of her Husband.

(z) *Fettiplace against Georges*, 3 Bro. Chan. Cas. 8, C. and see 1 Chan. Cas. 82, 118. 2 Chan. Cas. 182. Prec. Chan. 44, 121. *Gage v. Lister*, 6 Dec. 1705. Lord Harcourt's MS. Tables, 1 Ves. jun. 46. *Wagstaff and Smith*, 9 Ves. 521; and see *Rich and Cockell*, in 9 Ves. 375. *Heatley v. Thomas*, 16 Ves. 596. If a Feme Covert has a power of appointment by will with witnesses, in order to prove a due execution of her Power, there must be the judgment of the Ecclesiastical Court that the instrument is testamentary; and proof in the Court of Chancery by the Witnesses to the instrument. *Rich v. Cockell*, 9 Ves. 376; or if in the execution of the power, Witnesses were

not required to the Will, yet in addition to the proceedings in the Ecclesiastical Court there must be proof of her signing the Will.

(a) See *Greatly v. Noble*, 3 Madd. Rep. 79. *Stuart v. Lord Viscount Kirkwall*, *ibid.* p. 399. See *vide Kenge v. Delavall*, 1 Vern. 326.

(b) See *Greatly v. Noble*, Madd. Rep. 79, and what is said by the Lord Chancellor, in *Jackson v. Hobhouse*, 2 Meriv. 483.

(c) *Francis v. Wigzell*, 1 Madd. Rep. 362.

(d) *Guise v. Small*, 1 Anstr. 277.

(e) See *Sturgis v. Corp*, 13 Ves. 102; and *Fraser and Baillie*, 1 Bro. C. C. 518.

(f) *Richards v. Chambers*, 10 Ves. 583.

(g) This case was cited from a MS. note of Mr. Cox, in *Sperling v. Rochfort*, 8 Ves. 170, and is since published, 1 Cox, 358.

(1) Vide *Jaques v. Methodist Episcopal Church*, *ut supra*.

overruled (*f*). In those cases where an examination in Court of the Wife is necessary, the Property does not pass by force of the examination, or the intervention of the Court, but the Equity, by the consent of the Wife, being put out of the way, the Court makes its Decree (*g*).

It may be remarked, however, that where the separate Estate is to be disposed of by the Feme Covert, only in a particular manner directed by the Instrument giving the Estate, she cannot charge her separate Estate unless it be done, *eo modo*, as prescribed by the Instrument creating the separate Estate (*h*). So far as the Instrument creating her separate Estate makes her a Proprietor, so far is she a *Feme Sole*; and if she has pledged her Estate according to her power, the Trustee must hold it to the Uses she appoints (*i*). In some cases it seems to have been thought that a restriction on a Feme Covert's power over her separate Estate might be *inferred*, but the settled doctrine now seems to be that the Instrument giving her the Property must contain express words restricting the Wife's general Power, in order to effect such restraint. Though the Trust be, *to pay the Money into the hands of the Feme Covert from time to time, and take a Receipt from her*, yet still she has an absolute disposing power over it (*k*).

*477] *But where a Settlement was made by a Husband on his Wife, of Money to pay the Interest to her for Life, *with a proviso against anticipation*, it was held she could not charge her separate Estate (*l*); and Lord Eldon seemed of opinion she would not be chargeable even in the case of a fraud, as in that mode she might acquire a power of alienation against the intention of the Settlor (*m*).

In one Case, where a Legacy was given to the Wife *for her separate use* during her Life, with Remainder to such Person and for such Uses as she should appoint *by Will*, and in default of Appointment, to her *Executors*, it was ordered, upon her consent, to be paid to her Husband (*n*); but this case has been subsequently overruled, and the power of disposition confined to a disposition by *Will* only (*o*).

(*f*) So stated in *Sperling v. Rochfort*, 8 Ves. 174, and in *Richards v. Chambers*, 10 Ves. 583; and see what is said to the same effect in *Woollands v. Crowcher*, 12 Ves. 178.

(*g*) See *Richards v. Chambers*, 10 Ves. 587.

(*h*) *Jones and Harris*, 9 Ves. 497; see also *Essex v. Atkins*, 14 Ves. 548. *Lord Strange v. Smith*, Amb. 264.

(*i*) *Pybus v. Smith*, 1 Ves. jun. 194.

(*k*) In *Pybus v. Smith*, 1 Ves. jun. S. C. 3 Bro. 194, C. C. 340. Lord Thurlow doubted this; but subsequent decisions have overruled that doubt.

See *Brandon v. Robinson*, 18 Ves. 434, and *Jackson v. Hobhouse*, 2 Meriv. 487. *Wills v. Dawkins*, 12 Ves. 501. *Browne v. Like*, 14 Ves. 30.

(*l*) *Jackson v. Hobhouse*, 2 Meriv. 483; and see what is said in *Brandon v. Robinson*, 18 Ves. 434.

(*m*) *Jackson v. Hobhouse*, 2 Meriv. 483.

(*n*) *Newman v. Cartony*, mentioned in note 1, to *Willats v. Cay*, 2 Atk. 68.

(*o*) *Socket v. Wray*, mentioned in note 1, to *Willats v. Cay*, 2 Atk. 68. S. C. 4 Bro. C. C. 456.

Where a **Feme Covert** granted an Annuity charged upon her separate Property, and the Annuity, owing to the fault of the Grantee, failed, it was held that the separate Estate was not liable for the Consideration money, and that there was no Equity specifically to affect the Fund (*p*).

By Marriage the Husband acquires an absolute Property in all the personal Estate of his Wife, *capable of immediate [*478 and tangible possession; and if he marries without a Settlement, there is, as to such Property, no Equity to afford her relief (*s*); but if her Property is such as can only be reduced into Possession by Action at Law, or suit in Equity, he has only a qualified Interest, such as will enable him to make it an absolute Interest by reducing it into Possession; and with regard to *choses in action*, if he does not reduce them into Possession they will even at Law, in case of his death, survive to the Wife (*t*).

What Interests survive to the Wife in Equity, is determined, in general, by analogy to the Rules of Law. As at Law her *choses in action* not reduced into Possession by the Husband survive to her, so do her equitable Interests in the same case survive to her in Equity; but there are some legal Interests which do not admit or stand in need of being reduced into Possession, being in Possession already, and not lying in Action; as Terms for years, and other Chattels Real, of which the legal Title is in the Wife; but these will survive if no act is done by him; but he may assign them, and thereby pass the legal Interest, whether with or without, consideration (*u*). The analogy is followed in Equity. Equitable Interests of the same description may be transferred in the same manner. With respect to *choses in action* they are not assignable at law; consequently the Husband's Assignment cannot prevent *their legally surviving to the [*479 Wife. In strict analogy, therefore, equitable Interests of the nature of *choses in Action* ought not to be affected by his Assignment. But in Equity, a distinction seems to have been made between a *voluntary* Assignment, and an Assignment, for *valuable Consideration* (*x*); and that the Wife surviving is not bound by his voluntary Assignment (*y*), though she is bound by an Assignment for a valuable Consideration (*x*). But the Husband cannot dispose of his Wife's Chattels real by Will, nor bind

(*p*) Jones and Harris, 9 Ves. 485. See also Williams and Duke of Bolton, 2 Ves. 138. Sperling v. Rochfort, 8 Ves. 164. Socket and Wray, 4 Bro. C. C. 486.

(*s*) See Incledon v. Northcote, 3 Atk. 435.

(*t*) Langham v. Nenny, 3 Ves. 469.

(*u*) Mitford v. Mitford, 9 Ves. 99. &c. So he may forfeit the Lease, or it may be taken in Execution for his

Debts; but it is not so absolutely his as to be transmissible to his representatives, against the claim of the wife, surviving him. Wildman v. Wildman, 9 Ves. 177.

(*x*) Mitford v. Mitford, 9 Ves. 99.

(*y*) Burnet v. Kinnaston, 2 Vern. 401. 9 Ves. 99.

(*z*) Bates v. Dandy, 2 Atk. 207. Lord Carteret v. Paschal, 3 P. Wms. 197. 9 Ves. 99.

her Interest by a mere charge, as an Annuity, &c. (a), or by a Judgment without execution; but his contract to sell will be an equitable alienation (b), and if the Wife should survive the Husband, the term, so far as it shall not have been aliened or forfeited by the Husband, will remain with the Wife (c), but if the Husband should survive, it will, whether legal or equitable, remain with him (d).

The general Assignment in Bankruptcy has not the effect of reducing into Possession a Legacy of Stock, in Trust for the Bankrupt's Wife; and she by surviving becomes entitled (e). So, also, it has been determined, that Stock transferred into the name of a married Woman, as next of Kin of an Intestate upon the death of her Husband, without having done any act with reference to it, except signing partial transfers by her, survives to her (f).

*480] *If a Sum of Money be ordered to be paid to the Husband in right of his Wife, it is a vested Interest in him, and though he dies before payment, it does not survive to the Wife, but goes to his Executors (d).

A Possibility of the Wife, it has been held, may be assigned for a *valuable* consideration (e); but in a recent case it was held that the Husband cannot assign his Wife's reversionary Interest in Stock, so as to prevent her claim by Survivorship (f).

A consent by the Wife, *de bene esse*, on a Bill for that purpose, has been taken for the sale of the Wife's *reversionary contingent Interest* in Stock (g); but in a subsequent Case (h) the Court refused to take the Wife's consent to part with her reversionary Interest in Personalty.

Where a Husband and Wife, in right of the Wife, apply to demand an execution of a Trust of *Real Estate*, the Court makes no terms with the Husband, because the Wife, when the Estate is recovered, may keep it (i); but where the Husband's claim to his Wife's *personal* Property must be asserted by Suit in Equity, as where the Property is vested in Trustees who have the legal right, he cannot reach it without joining her with him in the Suit (k); and in such case the Court will make him, thus

*481] seeking for *Equity, do Equity, and provide for her, un-

(a) 1 Inst. 351 b. 1 Preston on Abstracts, 343.

(b) Sleed v. Cragh, 9 Mod. 42. 1 Preston on Abstracts, 343.

(c) 1 Inst. 351 a.

(d) Alleyn 15. 7 Roll. Abr. 345, 6. 1 Preston on Abstracts, 343.

(e) Mitford v. Mitford, 9 Ves. 87.

(f) Wildman v. Wildman, 9 Ves. 174.

(g) Heygate v. Annesley, 3 Bro. C. C. 362. Sed vide contra Nanney v. Martin, 1 Chan. Cas. 27.

(h) Bates v. Dandy, 3 Atk. 207.

Hawkins v. Obyn, 2 Atk. 549.

(f) Hornsby v. Lee, 3 Madd. Rep. 16.

(g) Woollands v. Crowcher, 12 Ves. 174, overruling the Argument of Mr. Maddocks in Saddington and Kinsman, 1 Bro. C. C. 47.

(h) Pickard v. Roberts, 3 Madd. Rep. 334.

(i) Lupton v. Tempest, 3 Vern. 626.

(k) 1 Chan. Cas. 41. Nelson's Rep. 78.

less she consents to give the Property to him (*l*), or the Property is a mere *Life Interest* in the Wife, and her Husband has not deserted her, or become Bankrupt (*m*). The first Case in which this principle was acted upon appears to have been *Mason v. Masters*, decided by *Lord Nottingham*. There the Defendant, a mean and indigent Man, stole a Marriage with one that had 500*l.*; half was paid down, half was secured by Bond. The Defendant sued upon the Bond, and *Lord Nottingham* restrained the Action till some provision was made for the Wife out of the Money; and at the same time dismissed a Bill brought by a Creditor of the Husband against the Trustee of this Bond, to pay him out of this Security,*which was a kind of Attachment in Equity (*n*). If a Feme Sole Mortgagee marries, and the Husband files a Bill of Foreclosure, the Court will not compel the Mortgagor to pay the Money to the Husband without his making some provision for his Wife; or at least the Wife, by an application to the Court against the Husband and the Mortgagor, may prevent the payment of the Money to the Husband, unless some Provision were made for her (*o*).

In all cases, indeed, where the Wife has a demand in her own right, and the Husband applies to the Court in her right, and there is no Agreement *previous to the Marriage (*p*), it is [*482 an established Rule (of doubtful policy perhaps) (*q*), that the Husband will not be allowed to obtain his Wife's Fortune (unless it be under 200*l.* or 10*l.* in annual payment (*r*), or unless, perhaps, where the Property is small, and the Husband is a *Freeman* of London) (*s*), without making a Provision for her; (1) nor

(*l*) *Lady Oxenden's Case*, 2 Vern. 494. *Langham v. Nenny*, 3 Ves. 469, and *Milner v. Colmer*, 2 P. Wms. 639.

(*m*) See *Wright v. Morley*, 11 Ves. 12, &c.

(*n*) See this Case stated by Lord Northington in *Forbes v. Phipps*, 1 Eden, 506.

(*o*) *Bosville v. Brander*, 2 P. Wms. 459.

(*p*) See *Brett v. Fereer*, 3 Atk. 400.

(*q*) *Brown and Elton*, 3 P. Wms. 205, 2 P. Wms. 639.

(*r*) *March v. Head*, 3 Atk. 720; and see General Order, Beames's Orders, &c. 464.

(*s*) See *Adams and Pierce*, 3 P. Wms. 13. *Sed quæ*. as to this, since the stat. 2 Geo. I. c. 18, which gives Freemen a power of bequeathing their Personal Estates.

(1) Vide *Howard v. Moffatt*, 2 Johns. Ch. Rep. 206. *Glen v. Fisher*, 6 Johns. Ch. Rep. 33. *Tatnell v. Fenwick*, 1 Des. 143. *Schuyler v. Hoyle*, 5 Johns. Ch. Rep. 210.

This equitable right of the wife asserted in the text, is founded upon the peculiar doctrine and practice of a court of equity, and not on the ground of any general reasoning. *Kenny v. Udall*, 5 Johns. Ch. Rep. 474.

A court of equity will lay hold of, and secure the property or money of a wife, which may be within its reach, for the purpose of securing to her a maintenance, when she is abandoned by her husband, or prevented, by his ill treatment, from cohabiting with him: Thus, where the husband abandoned his wife, and married another woman, with whom he lived for 20 years, it was held, that he had forfeited his right to her distributive share in personal estate inherited by her; and the court directed the principal of such share to be brought into court and put at interest, for her support during life; and after her death, to go to her lawful heirs. *Diamond v. Magee*, 4 Johns. Ch. Rep. 318.

does an inadequate Provision for her by *voluntary* Settlement after Marriage, vary the Rule (1). The doctrine is not modern ; it is adverted to in a very early Case by the *Lord Keeper Coventry* (u) ; but, (as it has been justly observed,) it is difficult to discover the ground of the Wife's Equity (x).

The Rule applies not merely to the Husband, but to Persons claiming through him, whether by operation of Law, or otherwise ; (1) on the Bankruptcy, for instance, of the Husband, it applies to his Assignees. The Assignees of a Bankrupt take, as the Husband would have done, subject to the *equitable Interest* of the Wife, and are bound to make a proper Settlement (y). (2) In one case, *half the Property* was given to the Wife (z), and *483] this seems the usual course in *such cases (a). A Settlement before Marriage of part of her Property to her separate use, does not bar her of this Equity (b). Where on a Bill filed by the Assignees of a Bankrupt, to recover Money to which the Bankrupt was entitled in right of his Wife, the usual reference was made to the Master to consider of proposals for a Settlement on the Wife and Children, the Master approved of a Settlement of the *whole* property on the Wife and Children. Exceptions were taken to his Report, and allowed, and he was directed to re-view his Report (c). (3)

(1) 2 Atk. 443.

(u) *Tanfield v. Davenport, Tothill*, p. 114.

(x) *Lloyd v. Williams*, 1 Madd. Rep. 458.

(y) *Jacobson v. Williams*, 2 P. Wms. 392. *Ex parte Colygame*, 1 Atk. 192. *Grey v. Kentish*, ib. 280. *Worsall v. Marr*, 2 Dick. 647. *Mitford v. Mitford*, 9 Ves. 86. *Wright v. Morley*, 11 Ves. 101. *Lamb v. Milnes*, 3 Ves. 517.

Freeman v. Parsley, 3 Ves. 424. *Osmell v. Probert*, 2 Ves. 680. *Pringle and Hodgson*, 3 Ves. 617.

(z) *Browne v. Clarke*, 3 Ves. 169.

(a) 1 *Christian's Bankrupt Law*, p. 271.

(b) *Burdon v. Dean*, 2 Ves. jun. 607.

(c) *Beresford v. Hobson*, 1 Madd. Rep. 362.

(1) The wife's equity, as it is called, attaches upon her personal property, whenever it is subject to the jurisdiction of a court of equity, into whose hands soever it may come, or in what manner soever it may have been transferred. And it will make no difference, whether the application to the court, be by the husband, or his representatives or assignees, to obtain possession of the property, or by the wife or her trustees, seeking a provision out of it. *Kenny v. Udall*, 5 Johns. Ch. Rep. 464. Vide *Haviland v. Myers*, 6 Johns. Ch. Rep. 25.

And this equity of the wife is equally strong and binding, whether the transfer of the property be by operation of law, or the act of the husband. *Kenny v. Udall*, *ut supra*.

(2) And where creditors come into a court of equity for relief against the husband, whose whole property was acquired by marriage, a suitable provision for the wife will be made. *Ex parte Beresford*, 1 Des. 263. And so, where a settlement is inadequate in reference to the estate brought by the wife, an additional allowance will be ordered, on a new accession of fortune, though the husband's creditors would, thereby, be in danger of not receiving their debts in full. *Ib.* 263.

(3) A court of equity may, in its discretion, give the whole, or a part only of the wife's property, for her maintenance, according to circumstances. *Kenny v. Udall*, 5 Johns. Ch. Rep. 464. Vide *Haviland v. Bloom & Myers*, 6 Johns. Ch. Rep. 178.

So, too, the Rule applies against a voluntary Assignee of the Husband (*d*), and, as it seems, even against a Purchaser for a valuable consideration of the Wife's interest from the Husband (*e*), except, perhaps, in the case of a *Trust of a Term for years* of Land, as to which *Lord Nottingham* (*f*) expressed great surprise, and others have entertained doubts. (*g*) The point, whether the Equity of the Wife can be barred, or affected by the Husband's Assignment for a valuable consideration, was once much questioned, but *Lord Nottingham* (*h*) held she was entitled a Provision in such case; (1) and *Sir Lloyd Kenyon* said "the more he thought upon the subject the more he was satisfied that such an Assignee must be subject to *the [*484 same Equity" (*i*). *Lord Alvanley* admitted, that *Lord Hardwicke* and *Lord Thurlow* (*k*) intimated difficulties whether an Assignment for a *valuable consideration* might not support the right of the Assignee, or at least evade this Equity; but he observed, "I have looked into almost every Case, and have never seen it determined, that any such Equity does exist in favour of the Assignee" (*l*). *Sir William Grant* seems to have thought there were some cases very difficult to reconcile with *Lord Alvanley's* proposition, for that there was hardly any other ground upon which *Lord Hardwicke* (*m*) proceeded in some of the Cases before him (*n*). An Assignment by a Husband of Dividends of Stock, in right of his Wife, to the amount of 100*l.* a year out of 260*l.* was held good, though a doubt was expressed, what would have been the effect if the *whole* of the Stock had been assigned (*o*).

If the Father of the Wife covenants to pay a sum of 1,000*l.* to the Husband, this is no part of the Wife's Estate, and may be obtained without a Settlement (*q*).

Whenever the Husband can come at the Estate of his Wife without the aid of a Court of Equity, the *Court cannot [*485

(*d*) *Jewson v. Moulson*, 2 Atk. 420.

(*e*) *Macaulay v. Phillips*, 4 Ves. 19; and see *Wright and Rutter*, 2 Ves. 711; but this point has been doubted. *Mitford v. Mitford*, 9 Ves. 100. *Wright v. Morley*, 11 Ves. 17, 22.

(*f*) See *Pitt v. Hunt*, 1 Vern. 18.

(*g*) 4 Ves. 19. *Sir Edward Turner's Case*, 1 Vern. 7. *Tudor and Samyne*, 2 Vern. 270; and see *Jewson v. Moulson*, 2 Atk. 420.

(*h*) *Earl of Salisbury v. Newton*, 1 Eden, 370.

(*i*) *Roberts v. Roberts*, 2 Cox, 422.

(*k*) See what *Lord Thurlow* said in *Worrel v. Marl*, and *Bushman v.*

Pell, mentioned 1 P. Wms. 459, in note. *Worrall v. Marl* is since reported 1 Cox, 158.

(*l*) *Like v. Beresford*, 3 Ves. 511, 512. and see *Pryor v. Hill*, 4 Bro. C. C. 139. *Pope v. Grashaw*, 4 Bro. C. C. 326.

(*m*) See *Grey and Kentish*, 1 Atk. 280, but said to be "arrant nonsense" as reported, 1 Dick. 494. *Bates v. Dandy*, 2 Atk. 208; and see *Lord Carteret v. Paschal*, 3 P. Wms. 199, before *Lord King*.

(*n*) *Wright v. Morley*, 11 Ves. 17. S. C. MS.

(*o*) *Wright v. Morley*, 11 Ves. 12.

(*q*) *Brett v. Forcer*, 3 Atk. 405.

(1) Vide *Kenny v. Udall*, 5 Johns. Ch. Rep. 464. *Haviland v. Myers*, 6 Johns. Ch. Rep. 25. *Haviland v. Bloom and Myers*, 6 Johns. Ch. Rep. 178.

interfere (r) ; nor will the Court, as before observed, interfere where the Wife's Property does not amount to 200*l.* (s). (1) He may dispose of the Trust of a Term which he has in right of his Wife, as well as of the legal Estate of a Term which he has in her right, without making a Settlement (t). So also, if the Wife's Debtor pay her Debt to the Husband (u) ; or if before a Bill is filed a Trustee who has the Wife's Property, Real or Personal, chooses to pay the Rents and Profits of the Real, or hand over the Personal, Estate to the Husband, (an improper act on his part) (x), the Wife has no remedy ; but *after a Bill filed* such Trustee cannot exercise a discretion ; for the Bill makes the Court a Trustee, and takes away his previous right of dealing with the Property (y). The Husband, it seems, may transfer Bank Stock belonging to his Wife, and the Bank cannot prevent it, nor can a Court of Equity, in such case, interfere to procure a provision for her (z).

There is no instance of a *Debtor* calling upon the Court to interpose an Equity for the Wife (a).

The equitable right which a married Woman has, in a Court of Equity, to a Provision out of her own Fortune, before her *486] Husband reduces it into Possession, *stands upon the peculiar doctrine of such Courts. (2) The habit of the Court has always been of itself, and without any application previously made by the married Woman, to direct an inquiry, where Money has been carried over to her account, whether any Settlement has been made adequate to the Fortune she then possessed (b) ; for the Money is carried over subject to that inquiry ; and the constant course has been to direct a Settlement, not upon the Wife only, but *upon the Children also*. She is not permitted to say she claims a Settlement for herself and not for her Children (c). She has the option not to have any Settlement made ; but if a Settlement is to be made, it is always directed for the benefit of the Wife and Children (d). She may, upon examination apart from her Husband, and with full knowledge of her right, the same being ascertained (e), waive a Settlement (f),

(r) See *Attorney-General v. Whorewood*, 1 Ves. 539.

(s) 5 Ves. 742, in note. Beames's Orders, 464. Ante p. 482.

(t) *Tudor v. Sainyne*, 2 Vern. 270. Sed vid. 4 Ves. 19.

(u) *Mitford v. Mitford*, 9 Ves. 100, 101. *Jewson v. Moulson*, 3 Atk. 419.

(x) See *Lord Elibank v. Montolieu*, 5 Ves. 743.

(y) *Murray v. Lord Elibank*, 10 Ves. 90 ; and see *Glaister v. Hewer*, 8 Ves. 206. *Macauley v. Phillips*, 4 Ves. p. 19.

(z) *Wildman v. Wildman*, 9 Ves.

176 ; and see *Pringle v. Hodgson*, 3 Ves. 620.

(a) *Glaister v. Hewer*, 8 Ves. 206.

(b) *Lady Elibank v. Montolieu*, 5 Ves. 743, 4. *March v. Head*, 3 Atk. 721.

(c) *Murray v. Lord Elibank*, 13 Ves. 6.

(d) Ibid. 6, 7.

(e) *Sterling v. Rochfort*, 8 Ves. 164. *Woollands v. Crowcher*, 12 Ves. 178. *Edmonds v. Townshend*, 1 Anstr. 98. Anon. MS.

(f) See *Wright v. Rutter*, 2 Ves. 677. *Dimmoch against Atkinson*, 3 Bro. C. C. 195.

(1) Vide *Howard v. Moffatt*, 2 Johns. Ch. Rep. 206.

(2) Vide *Kenny v. Udall*, 5 Johns. Ch. Rep. 474.

even in favour of a Husband who is insolvent (g), and she can do it in that way only (h): an Agreement out of Court, even where the Wife lives apart from her Husband is insufficient (i).

From several Cases, as reported, it might appear doubtful whether Children have any substantive and independent right to claim a Settlement out of the property of their Mother, if a Settlement was not directed during *her life (k). Lord [*487 *Hardwick* seems in one case, to have thought they had such a right (l); but in a subsequent Case he held differently (m). Sir *Thomas Clarke* considered the Children as having a right; but his Decree was afterwards reversed by Lord *Northington* (n). The point, however, seems settled by a recent Case, in which all the Authorities were fully considered (o), and where it was holden, that the Children of a Feme Covert, a Legatee, have no Equity to insist on a Settlement after the death of the Mother, unless there is a Contract, or a Decree for a Settlement in the Lifetime of the Mother (p). If there has been a Decree directing a Settlement on the Wife and Children, and she does nothing to waive the Equity, (for in this stage she may waive it as to herself, but not perhaps, as to her Children) (q), and she dies before the Report, the Children are entitled (r). So if after a Proposal of a Settlement by the Husband, he dies, the Children would have a right to have it carried into execution (s).

If a Husband who has received the greatest part of his Wife's Portion, (it would be otherwise, it seems, if he had received no part of her Portion) (t) refuses *to make a Settlement [*488 out of the small remainder of her Portion, the fund will be ordered to be paid into Court, and he will be prevented from receiving the interest of such residue, unless he is starving (u).

In all those Cases where a Settlement is made, the Husband is considered as entitled to the Income of his Wife's equitable interest during his life, unless he has received some fortune with her, or has misbehaved (x), as by running away with a Ward of

(g) *Willats v. Cay*, 2 Atk. 67; but see *Ex parte Higham*, 2 Ves. 579.

(h) *Macaulay v. Phillips*, 4 Ves. 18.

(i) *Ibid.* 15.

(k) *Murray against Lord Elibank*, 13 Ves. 7.

(l) *Grosvenor v. Lane*, 2 Atk. 180, and see 2 Ves. 672.

(m) *Hearle v. Greenbank*, 3 Atk. 717.

(n) *Scriven against Tapley*, Amb. 509. S. C. 2 Eden; See also *Cockel v. Phips*, 1 Dick. 391. These cases are noticed by Sir William Grant, in *Murray* and Lord Elibank, 13 Ves. 7.

(o) *Lloyd v. Williams*, 1 Madd. Rep. 450.

(p) *Ibid.*

(q) See 2 Ves. 672.

(r) *Murray v. Lord Elibank*, 13 Ves. 1 S. C. 10 Ves. 84, on demurrer; and see *Macaulay v. Phillips*, 4 Ves. 19, 20; and also *Becket and Becket*, 1 Dick. 343. *Rowe v. Jackson*, 2 Dick. 604.

(s) *Anon.* 2 Ves. 672.

(t) See 2 Ves. 562.

(u) *Bond v. Simmons*, 3 Atk. 21.

(x) *Macaulay v. Phillips*, 4 Ves. 15. See *Bond v. Simmons*, 3 Atk. 20.

the Court (*y*), or is separated from his Wife (*z*), or leaves her unprovided for (*a*), or has become a Bankrupt (*b*), or makes a general Assignment for the benefit of his Creditors (*c*).

And the Court will prevent the Husband taking the interest of Money in Court, the property of the Wife, upon the Wife's *Affidavit* of ill treatment; and will direct it to be paid into Court (*d*); and in case of *desertion* (*e*) or other ill conduct (*f*), will order her a provision; and where the Husband goes abroad, and has assigned part of the Dividends of stock belonging to his Wife, without making any provision for her, the remaining Dividends will be ordered to be paid to her (*g*), or till he thinks proper to return and maintain her (*h*).

*489] *In one Case, where advances had been made for her Maintenance, to a married Woman deserted by her Husband, on the credit of a Fund in Court her Property, and exceeding the income of such fund, he was ordered to be reimbursed out of the Capital (*h*).

But the Court will not interfere if the Wife refuses to live with her Husband (*i*); and where there has been a Divorce for adultery by the Wife, the Chancellor refused to order Money, settled to her separate use, to be paid either to the Wife or the Husband (*k*), and in such case, Trustees will, if necessary, be restrained from proceeding at Law to recover her separate Maintenance (*l*). So, if the Wife refuses to live with her Husband (*m*), or *elopes*, the Court will not assist her in recovering Property settled to her separate Use (*n*).

If a Feme Covert has *Pin Money* (*o*) secured by a Term, and runs away and lives in Adultery, and the Trustees proceed at Law to recover the Term, it seems they may be restrained; but if she left her husband on account of ill usage, or other reasonable grounds, or the Husband acquiesced in her departure, Courts of Equity will not interpose (*p*).

(*y*) See *Like v. Beresford*, 3 Ves. 506.

(*z*) *Ball and Montgomery*, 4 Bro. C. C. 339. S. C. 2 Ves. jun. 191.

(*a*) *Sleech v. Thorington* 2 Ves. 562. *Wright v. Morley*, 11 Ves. 12.

(*b*) *Wenman v. Mason*, 1 P. Wms. 459, in note.

(*c*) *Pryor v. Hill*, 4 Ves. 138.

(*d*) *Alexander v. M'Culloch*, cited in *Ball and Montgomery*, 2 Ves. jun. 191; and alluded to in *De Manneville and De Manneville*, 10 Ves. 56.

(*e*) *Allerton v. Nowel*, mentioned 4 Ves. 799; and see *Oxenden v. Oxenden*, 2 Vern. 494.

(*f*) See *Allerton v. Nowell*, 1 Cox, 229.

(*g*) *Wright v. Morley*, 11 Ves. 12.

(*h*) *Watkins v. Watkins*, 2 Atk. 97.

(*i*) *Grey v. Pearkes*, 18 Ves. 196.

(*j*) *Bullock v. Menzies*, 4 Ves. 798.

(*k*) *Carr v. Eastbrooke*, 4 Ves. 146.

(*l*) *Moore v. Moore*, 1 Atk. 276.

(*m*) *Barn*. 136.

(*n*) *Lee v. Lee*, 1 Dick. 321. and 2 Dick. 806. *Mildmay v. Mildmay*, 1 Vern. 53.

(*o*) What Addison thought of *Pin Money*, may be seen in No. 295 of the *Spectator*. Lord Eldon has said, "I detest *Pin Money*, and have a strong prejudice against it." *Wheatley's Case*, 1804, MS.

(*p*) *Sir R. More and Earl of Scarborough*, 2 Eq. Abr. 156.

If an annual sum be secured for the Wife's Pin Money for her Apparel and Expenses, and the Husband and Wife cohabit together, and the Husband *maintains her, the Arrears of [*490 Pin Money are not recoverable (*q*) beyond the Year (*r*), for in such case she is supposed to have been satisfied; but if the Wife lives separate, and has no Allowance, an account of the Arrears of Pin Money will be decreed (*s*).

To resume the consideration of Trusts raised by Settlements, we may next consider the creation of *Trustees to support contingent Remainders*.

These Trusts arose out of the doctrine in *Chudleigh's Case* (*t*), and *Archer's Case* (*u*), but they were not put in practice till the time of the Usurpation (*x*), when *Sir Francis Moore* first made use of them. *Duncombe and Duncombe* (*y*), appears to have been the first Case in which such a Limitation to Trustees came in question (*z*).

Where an Estate (*a*) is limited to A. for life, remainder to his first, &c. Sons in Tail, though it be a plain wrong and tort in him to do any act which will destroy those contingent Remainders, ("a most barbarous thing," *Lord Talbot* calls it) (*a*), before the birth of a Son, notwithstanding his legal power of doing so, yet as in such case there is no Trustee, there can be no Trust, nor consequently any breach of trust, and therefore a Court of Equity has no cognizance of such a case, the matter being left purely to the Common *Law. Whether a Tenant for [*491 Life, of an Equitable Estate can destroy Contingent Remainders has been doubted (*b*); but in *Chapman v. Blissett* (*c*), *Lord Talbot* seemed clearly of opinion, that an Equitable Tenant for Life could not bar Contingent Remainders.

The appointment of Trustees was invented on purpose to disable the Tenant for Life from destroying Contingent Remainders; for if before the birth of a Son, a mere Trustee to preserve Contingent Remainders, (it would be different if he were Tenant for Life, as well as Trustee) (*d*), whether appointed under a Settlement voluntary, or for a valuable consideration, or by Will (*e*), joins in barring such Remainders, it is a breach of

(*q*) *Thomas v. Bennet*, 2 P. Wms. 680. *Garth and Cotton*, 3 Atk. 754. 341; and see *Fowler v. Fowler*, 3 P. Wms. 353. These cases overrule what is said in *Duke of Norfolk's case*, Pollexf. 250.

(*r*) See 2 Ves. 190.

(*s*) *Aston v. Aston*, 1 Ves. 267.

(*t*) 1 Co. 120.

(*u*) *Ibid.* 66.

(*x*) *Garth v. Cotton*, 1 Ves. 555.

(*y*) 3 Lev. 437.

(*z*) *Garth v. Cotton*, 1 Ves. 555.

(*a*) *Mansell and Mansell*, 2 P. Wms. 681. S. C. MS. *Pye v. George*, Salk.

(*a*) For. 239.

(*b*) *Hopkins v. Hopkins*, Mich. 892. 1733. MS. S. C. 1 Atk. 580.

(*c*) MS. S. C. For. 145.

(*d*) *Osbrej v. Bury*, and 1 Ball & Beatty, 58.

(*e*) *Mansel v. Mansel*, 2 P. Wms. 678. S. C. MS. *Symence v. Tattam*, 1 Atk. 614.

Trust, and he is answerable to a Son afterwards coming into existence; and so is a Purchaser with notice (*f*), or a Person taking by voluntary Conveyance (*g*); but it seems that only the first Son, and not second and other Sons, have this shield thrown over their Interest (*h*), though a difference has been made where the Limitation is by *Settlement*, and where by *Will*; as in the latter case all persons are *Volunteers* (*i*).

Where Trustees, to preserve Contingent Remainders are called *492] upon to join for the purpose of a new Settlement, *upon the Marriage of the eldest Son, making the Tenant in Tail Tenant for Life, and continuing instead of destroying the object of the Settlement, in such cases it has been said the Court will compel them to join (*k*); and also in some cases, though not for that purpose, but under some particular distress, or other special circumstances (*l*); but, generally, in all other cases, and where instead of the ordinary limitation to a Tenant for Life it is to the Husband for a term of years, if he shall so long live, with Remainder to Trustees during his Life, to preserve Contingent Remainders, the Court will leave it to the discretion of the Trustees (*m*). If the Trustees improperly use their discretion, or refuse to exercise it upon a proper occasion, the Court, it has been said, will interfere (*n*).

And where the Court has, at the instance of an eldest Son, ordered Trustees to join in the destruction of Contingent Remainders, it has sometimes imposed conditions upon the Son, as that he should make a Provision for a Sister (*o*).

Trustees in a *voluntary Settlement* have, upon the Bill of Creditors, claiming under a subsequent Conveyance in Trust for the payment of debts, been decreed to join in destroying the Contingent Remainders (*p*). And such Trustees (there being no Issue) have been decreed to join in a Sale where the Settlement *493] was *only of an Equity of Redemption, and the Wife consented to the Sale (*q*).

It has been said, that Trustees ought never to join in the destruction of Contingent Remainders without the direction of the

(*f*) *Mansell v. Mansell*, For. 253. S. C. MS. *Moody v. Walters*, 16 Ves. 303, 307. *Pye v. George*, 1 P. Wms. 128. S. C. 2 Salk. 696. and in 1 Eq. Cas. Abr. 384. *Biscoe v. Perkins*, 1 Ves. & Bea. 491.

(*g*) *Ibid.* 129. *Mansell and Mansell*, 2 P. Wms. 680, and MS.

(*h*) *Walter and Moody*, 16 Ves. 304; but see *ibid.* 305, and *Topping and Piggot*, 1 Eq. Ca. Abr. 385.

(*i*) See *Barnard and Large*, 1 Bro. C. C. 535.

(*k*) As in *Winnington v. Foley*, 1 P. Wms. 536; and see *Symance v. Tattam*, 1 Atk. 613. See *vid.* *Biscoe v. Perkins*,

1 Ves. & Bea. 492.

(*l*) See *Barnard and Large*, Amb. 77.

(*m*) See *Woodhouse v. Hoskins*, 3 Atk. 24; and Arg. o. *Moody v. Walters*, 16 Ves. 291. *Fearne on Remainders*, 331. fifth edit. and the cases there cited.

(*n*) *Barnard and Large*, 1 Bro. Ch. Ca. 535. *Moody v. Walters*, 16 Ves. 307.

(*o*) *Frewin and Charlton*, 1 Eq. Abr. 386, quot. 16 Ves. 304.

(*p*) *Basset v. Clapham*, 1 P. Wms. 358, quot. 16 Ves. 305.

(*q*) *Platt v. Sprigg*, 2 Vern. 303.

Court (r); but it seems, that as the Court only decrees the Trustees to do *what they ought to do*, it is not necessary for Trustees, in clear cases, to apply to the Court; and that the absence of that sanction will not render the act a breach of trust (s). The doctrine on this subject is, however, involved in difficulties; so much so, that as great a Judge as ever existed, has said, upon a review of the Cases as to the duties and liabilities of Trustees, "The task of deducing from them what is the true principle is greater than I have abilities well to execute. The Cases," says he, "are uniform to this extent, that if Trustees, before the first Tenant in Tail is of age, join in destroying the Remainders, they are liable for a breach of trust; and so is every Purchaser under them with notice; but when we come to the situation of Trustees to preserve Remainders, who have joined in a Recovery after the first Tenant of Tail is of age, it is difficult to say more than that no judge in Equity has gone the length of holding that he would punish them as for a breach of trust, even in a case where they would not have been directed to join. The result is, that they seem to have laid down, as the *safest* rule for Trustees, but certainly most inconvenient for the *general [*494 interests of Mankind, *that it is better for Trustees never to destroy the Remainders, even if Tenant in Tail of age concurs, without the direction of the Court*" (t).

Trustees created by express Limitation, for the purpose of preserving Contingent Estates, are guilty of a neglect of their duty, if they permit the Tenant for Life, liable to impeachment for Waste, or a Tenant *pur autre vie*, who by the nature of his Estate is liable for waste to destroy Timber (u). Neither ought such Trustees to permit the Tenant for Life or Years, by the destruction of his Estate, to bring forward a Remainder to himself or another for the purpose of cutting Timber (x). In the case of Copyholds, the Lord's Estate will preserve Contingent Remainders, without any express nomination of Trustees for that purpose (y); but *Lord Eldon* seems to doubt whether it is his duty to interpose actively to prevent Waste (z).

Trust Terms for raising of Portions are also usual in Settlements.

Where Portions are thus to be raised, and there is also a Covenant by the Settlor to pay them, the Real Estate is considered as the *primary Fund*, and the Personal Estate of the

(r) See *Fearne on Contingent Remainders*, p. 336, and Mr. Cox's note to *Basset v. Clapham*, 1 P. Wms. p. 358.

(s) See *Moody and Walter*, 16 Ves. 310. *Woodhouse v. Hopkins*, 3 Atk. 24.

(t) Per Lord Eldon, in *Biscoe v. Per-*

Kins, 1 Ves. & Bea. 491.

(u) *Stansfield v. Habbergham*, 10 Ves. 283.

(x) *Garth and Cotton*, 1 Dick. 183. 3 Atk. 751. 1 Ves. 524. 546. *Stansfield v. Habbergham*, 10 Ves. 279.

(y) See *Garth and Cotton*, *ib.*

(z) 10 Ves. 282.

Covenantor is *auxiliary* only (a). It is the same, though the Covenant be to settle absolutely within six months, and it is broken, so that damages might be recovered; for still the party *495] must *first resort to the Land, and only in case of a deficiency, call upon the Personal Estate (b). If there be a Covenant to settle Lands, and to raise a term of years out of them for securing a Portion, but no Covenant for the payment of the Portion, and only a Bond for performance of Covenants, the Portion is not in any event payable out of the Personal Estate (c).

Parents may make a Provision for Children, which shall depend upon the condition for their surviving them (d); but to do so, the intention must be very strongly expressed; for, contrary to the obvious meaning of expression, it is a Rule, established by many Decisions, that if Portions are directed to be paid at the age of twenty-one, or on the Marriage of Daughters, with Survivorship, followed by a Provision, that if they attain those periods in the Life of the Father, the Portions shall not be paid till after his death, a clause originally framed to obviate the difficulty arising from the determinations that charged the Reversion, by permitting Interest to be carried on from the age of twenty-one, though there was an Estate for Life (e), yet that clause will not prevent the *vesting* in the Life of the Father (f); for in these cases the Court looks upon it as a hard thing to impute to a Father that he should mean, a Child having attained *496] twenty-one, or come to marriageable *years, and formed a Family, and because that Child dies in his Life, the Descendants should have nothing; and feeling that not to be a probable intention in a Parent, the Court have thought themselves at liberty to manage the construction of the Words, as they would not in the *case of a Stranger*, or upon a matter of *Contract*, without any mixture of parental feeling (g). But where, in addition to the before-mentioned Proviso, there is a Limitation over in the event of no Child living at the death of the Survivor of the Parents, or of the death of all, "before the Fund should so as aforesaid be payable, &c." the gift, it seems, is contingent (h). In general, indeed, where there is nothing to the contrary, if

(a) *Lechmere v. Charlton*, 15 Ves. 208. 193.

(b) *Edwards v. Freeman*, 2 P. Wms. 438.

(c) *Ibid.* 437; and see 1 P. Wms. 293, and 2 P. Wms. 435.

(d) *Woodcock against the Duke of Dorset*, 3 Bro. C. C. 570, but more correctly stated from the Registrar's Book in a note to *Howgrave v. Cartier*, 3 Ves. & Bea. p. 82. *Powis v. Burdett*, 9 Ves. 435.

(e) *Willis v. Willis*, 3 Bro. C. C. 84; and see *Emperor v. Rolfe*, 1 Ves.

(f) *Hope v. Clifden*, 6 Ves. 499.

Willis v. Willis, 3 Ves. 51. *Powis v. Burdett*, 9 Ves. 428. *King v. Hake*, 9 Ves. 438. *Schenck v. Legh*, 9 Ves. 300. *Jefferies v. Reynous*, quot. 9 Ves. 311. *Emperor v. Rolfe*, 1 Ves. 209.

(g) *Hope v. Clifden*, 6 Ves. 507; and see on this subject *Howgrave v. Cartier*, 3 Ves. & Bea. 79. S. C. Coop. 66.

(h) See *Schenck v. Legh*, 9 Ves. 300.

Parties have fixed upon the time for the payment of a Portion, that time is the period of vesting, and is the time from which the Portion becomes transmissible (i). If the Settlement clearly and unequivocally makes the right of the Child to a Provision depend upon its surviving both or either of the Parents, a Court of Equity has no authority to control that Disposition; but if the Settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory clauses, so as to leave, in a degree uncertain, the period at which, or the contingency upon which, the Shares are to vest, the Court leans strongly towards the construction which gives a vested Interest to the Child, where that Child stands in need of a Provision; *usually as to Sons [*497 at the age of twenty-one, and as to Daughters at that age, or Marriage (k).

The raising or not raising of a Portion depends upon the particular penning of the Instrument creating the Trust (l).

Lord Hardwicke expressed his unwillingness to raise Portions or Interests upon them out of *Reversionary Terms*, and refused so to raise them upon *construction* or *implication* only (m); but he laid it down as a Rule, that if a term of Years, or other Estate, be limited to Trustees for raising Portions for Daughters, payable at a certain time, which have become a vested Interest, they shall not stay till the death of the Father and Mother, unless some intention appears to postpone them, in which case the Court will always take notice of such intention, and postpone them accordingly; and the latter Cases, as *Brome* and *Berkley* (n,) and others (o), show, the Court has laid hold of *very small grounds* that speak the intent of the Parties, to hinder the raising of Portions in the Life of the Father and Mother. Lord Eldon, however, has observed, "The Court ought not to be eager to lay hold of circumstances. The Court," says he, "ought to hold an equal mind while construing the instrument. And I cannot agree with what is said in *Stanley v. Stanley* (p), that *very small grounds are sufficient*. If they are *sufficient to denote [*498 the intention they are not small grounds; if they are not sufficient to denote the intention, the Court does not act according to its duty by treating them as sufficient: thereby disappointing the true intention of the Instrument (q)." The first Cases in which the Portion was ordered to be raised in the Life of the Parent were *Graves* and *Maddison*, and *Gerrard* and *Gerrard* (r), which were followed by some others; but in the Case of *Corbet*

(i) *Verney v. Verney*, 1 Eden's Rep. 31.

(k) *Howgrave v. Cartier*, 3 Ves. & Bea. 85, 6.

(l) *Codrington v. Lord Foley*, 6 Ves. 379.

(m) *Lyon v. Chandos*, 3 Atk. 417; and see *Ravenhill v. Dansey*, 2 P. Wms. 179.

(n) 2 P. Wms. 484.

(o) *Stanley v. Stanley*, 1 Atk. 549; and see *Stevens v. Dethick*, 3 Atk. 42. *Verney v. Verney*, 2 Eden's Rep. p. 26.

(p) 1 Atk. 549.

(q) *Codrington v. Lord Foley*, 6 Ves. 380.

(r) 2 Vern. 458.

and *Maidwell* (s), *Lord Couper* made a stand, and said he would lay hold of any words to prevent being bound by the former Decisions (t). *Lord Macclesfield* followed his example, and refused to go "one jot farther" than the preceding Cases (u). This doctrine has been followed, and Courts will lay hold of any words from which it can be fairly inferred, that it was not the intention to charge the Reversionary Term with raising Portions in that manner, for it is tearing an Estate to pieces, ruining the eldest Sons of Families (x), and encourages undutifulness and improper Marriages (y); if, therefore, upon the context of the Settlement any thing can be collected by which it may appear that it could not be the intention of the Parties to raise them in that *499] way, the Court is extremely eager to lay hold of *it (z). Accordingly where the Portion was directed absolutely to be paid at the age of twenty-one or Marriage, but Maintenance was directed not to commence until the Estate of the Trustees should take effect in Possession, the Court on that account refused to raise the Portion by a Sale of the Reversionary Term (a). Questions, however, of this sort, do not now often arise, for negative words are usually inserted in Settlements to prevent Portions being raised in the Life-time of the Father and Mother, without their consent (b); but where there are great Estates, it is common to direct, that upon the death of the Father the Portions for the Daughters shall be raised in the Life-time of the Grandfather, so as not to suspend the raising of them till after two Lives (c). If there is nothing more than a Limitation to the Parent for Life, with a Term to raise Portions at the age of Twenty-one, or Marriage, and the Interests are vested, the Contingencies having happened at which the Portions are to be paid, the Interest is payable, and the Portions must be raised by Mortgage or Sale of the *Reversionary Term*, the only manner in which they can be raised (d). Where a Term is created for Daughters Portions, commencing after the death of the Father *500] *and Mother, upon Trust to raise the Portions from and after the commencement of the Term, and the Father dies, leaving

(s) 1 Salk. 159. 2 Vern. 685.

(t) See what Lord Hardwicke says in *Stevens v. Dethick*, 3 Atk. 41.

(u) *Butler v. Duncombe*, 1 P. Wms. 452. *Reresby and Newland*, 2 P. Wms. 99.

(x) See *Reresby v. Newland*, 2 P. Wms. 93.

(y) See the arguments of Lord Chancellor and Master of the Rolls in *Brome v. Berkley*, 2 P. Wms. 485, &c. and *Hall v. Carter*, 2 Atk. 355. *Stevens v. Dethick*, 3 Atk. 42. *Reresby v. Newland*, 2 P. Wms. 99; but see the observations in *Smith against Evans*, Amb. 634; as to the prudence of these Decisions.

(z) *Clinton v. Seymour*, 4 Ves. 460; and see *Brome v. Berkley*, 2 P. Wms. 484. See also *Sandys v. Sandys*, 1 P. Wms. 707.

(a) *Brome v. Berkley*, 2 P. Wms. 484; confirmed on appeal to the House of Lords, 3 Bro. P. C. 437.

(b) *Hall v. Carter*, 2 Atk. 355. *Reresby v. Newland*, 2 P. Wms. 99.

(c) *Lyon v. Chandos*, 3 Atk. 418.

(d) *Codrington v. Lord Foley*, 6 Ves. 364. *Stanley and Stanley*, 1 Atk. 549; and see *Sandys v. Sandys*, 1 P. Wms. 707. *Hebblethwait v. Cartwright*, For. 81. S. C. MS. under the name of *Iblethwaite v. Cartwright*.

a Daughter, the Portion becomes vested, but is not raiseable during the Life of the Mother (e).

On a Bill filed on behalf of younger Children, to raise Portions out of the Real Estate, the Infant Heir ought to be made a Defendant, not a Plaintiff (f).

If there be a Power to charge Premises with Portions for younger Children, an *eldest Daughter*, where there is a Son, or where the Estate by a Settlement goes all to a Remainder-man, is considered in Equity as a *younger Child* (g).

Where a Father on the Marriage of a Daughter gives her a Portion, and she agrees to take it in satisfaction of any demand she may afterwards have on his Estate, this will amount to a bar of any claim she may subsequently have on the Father's Estate (h).

It has been said. there is no instance of mortgaging a Reversion for the payment of *Maintenance* given by way of Portion (i); but the Rule seems to be, that a Reversionary Term raised for securing Maintenance and Portions for Daughters, shall in cases of necessity be mortgaged to pay either, and when fallen into Possession shall pay all the arrears of Maintenance incurred before it came into Possession (k).

*When Portions are charged on Estates, to pay in equal [*501 rates and portions, they must be paid *pro rata*, as to the value of the Estates (l).

There are two ways of raising Portions, one by Sale or Mortgage, the other by perception of Profits (m).

If a Portion be directed to be raised by a given time out of the Rents and Profits of an Estate, unless *annual* Rents and Profits are mentioned (n), or distinctly appear as exclusively intended to satisfy the charge (o), the land itself may be sold (p); but if no time for payment is appointed, a Sale will not be decreed (q), though the Portion be vested, but must be raised out of the Rents and Profits (r). Nor will a Sale be decreed if there

(e) Butler and another v. Duncombe, 1 P. Wms. 448.

(f) Plunket v. Joice, 2 Sch. & Lefr. 159.

(g) Beale v. Beale, 1 P. Wms. 244.

(h) Morris v. Burroughs, 1 Atk. 402. Metcalfe v. Ives, 1 Atk. 64.

(i) Pierpont v. Lord Cheney, 1 P. Wms. 493. Sed vid. what is said of this case, 4 Ves. 464.

(k) Ravenhill v. Dansey, 3 P. Wms. 179.

(l) Tate against Hilbert, 4 Bro. C. C. 286.

(m) Evelyn v. Evelyn, 2 P. Wms. 669.

(n) Trafford v. Ashton, 1 P. Wms. 415.

(o) Small v. Wing, 5 Bro. P. C. 66. Tomlyn's Edit. The last Editor of these Cases says, "this Case appears to have been a matter of intricate private accounts, and can scarcely be quoted as a Precedent;" but in this he is mistaken.

(p) Backhouse v. Middleton, 1 Chan. Cases, 176; and see post.

(q) Sheldon v. Dormer, 2 Vern. 310. Ivey v. Gilbert, Prec. Chan. 683. S. C. 2 P. Wms. 13. Green v. Belchier, 1 Atk. 506. Evelyn v. Evelyn, 2 P. Wms. 668. Ravenhill v. Dansey, 2 P. Wms. 180. Okedon v. Okedon, 1 Atk. 551.

(r) 2 P. Wms. 671. Earl Rivers v. Earl Derby, 2 Vern. 72.

be a Power of satisfying the charge by another mode; as, if there be a Power to *lease* or to *mortgage* the Premises (s); for all Trusts of Terms directing the methods of raising Money, imply a negative, (viz.) that the Money shall be raised by the methods prescribed, and not otherwise (t).

*502] *But where a Term is limited to raise Portions by Rents and Profits for younger Children, the Heir it seems, may insist on having the Portions raised by a Sale, though the younger Children object (u).

Directing a gross sum to be raised by way of Portion does not necessarily imply that it shall be raised *at once*, for it may be raised out of the *Rents and Profits*, and so laid up till it amounts to that sum (x).

Interest is payable on Portions from the time they become due (y); but so long as they remain liable to a Contingency, no Interest is payable (z); as, where there is a Power to raise Portions, and for the Husband, with the consent of the Trustees, to revoke all the Uses, this suspends the Portion, and it may be revoked any time before it is raised and paid (a).

A Portion charged on real Estate, carries *Interest* at four per Cent. (b) from the time the Portion ought to be raised and paid, although Interest is not mentioned (c), because it may be necessary that Interest should be given by way of Maintenance, for there may be no other (d).

*503] But where there is a Power to raise Portions for *Children charged upon an Estate, that Power necessarily imports, that from the time the Portion to be raised is payable or vested, it is also in discretion of the Party, as a necessary consequence of it, to prescribe what rate of Interest shall be given, provided it does not exceed legal Interest (e). The Court only interferes by giving four per Cent. where no rate is specified by him who has a right to fix the Sum (f).

In cases where Parties sleep upon their rights, and no compromise or discussion of their claims has taken place, and where the Defendant is ignorant of such claims, and there is no disability on the one side, or Fraud on the other, Interest will not be

(s) *Ivy v. Gilbert*, 2 P. Wms. 13, mentioned also 2 P. Wms. 672. *Mills v. Banks*, 3 P. Wms. 1.

(t) *Butler and Duncombe*, 1 P. Wms. 448. *Mills and Banks*, 3 P. Wms. 7.

(u) *Warburton v. Warburton*, 2 Vern. 420.

(x) *Okedon v. Okedon*, 1 Atk. 551; and see *Evelyn v. Evelyn*, 2 P. Wms. 666.

(y) *Rolt v. Rolt*, For. 189. *Hall v. Carter*, 4 Ves. 357. See *Butler v. Duncombe*, 1 P. Wms. 453. *Lyon v. Chandos*, 3 Atk. 416; but see

the remark on that case in 4 Ves. 463.

(z) *Reresby v. Newland*, 2 P. Wms. 101, affirmed Dom. Proc. 2 Bro. C. C. 487.

(a) *Ibid.*

(b) *Guillam v. Holland*, 3 Atk. 343.

(c) *Earl Pomfret v. Lord Windsor*, 2 Ves 487.

(d) *Boycott v. Cotton*, 1 Atk. 555.

(e) *Lewis v. Freke*, 2 Ves. jun. 511; and see *Boycott v. Cotton*, 1 Atk. 552.

(f) 2 Ves. jun. 512. *Roe v. Pogson*, 2 Madd. Rep. 457.

given on a Portion, or an Account directed of the Rents and Profits farther back than from the filing of the Bill (g).

A Limitation over of a Portion in a Settlement in case of death before it shall become payable, does not prevent the Interest from vesting; and the same doctrine, it seems, extends to Portions created by Will.

A Daughter's Portion secured by a Trust Term is not extinguished by a Devise of the Lands to the Daughter in Tail (h).

2. We proceed now to consider the Trusts usually raised by Deeds on Conveyances to Purchasers. The Trust here more particularly alluded to is the Assignment of a Term to a Trustee with a view to prevent any right to Dower attaching on [*504 the purchased Estate (i).

"These Terms are," (as Lord Hardwicke says, using the language in older Cases) (k), "mere creatures of Equity, partly to protect real Estates, and partly to keep them in the right channel" (l). All Terms of years created either by Will (m), or by Deed, by way of Mortgage, for instance, or for securing the payment of Jointures, Portions for Children, or indeed, for any other purpose, do not determine (without a special provision for that purpose,) by the performance of the Trusts for which they are raised, but continue to exist in the Termor, for the benefit of the Owner of the Inheritance (n). If, for instance, a Man seised in Fee of Lands grants a Lease for a long Term of Years to Trustees, for payment of his Debts, or for some other purpose, without providing that after his Debts are paid, or purpose accomplished, the Term shall cease, or attend the Inheritance, yet Courts of Equity hold, that after the Debts are paid, or purpose accomplished, the Term continues in the Lessee, and is, as its shadow, attendant on the Inheritance, whether declared by the original Conveyance to attend the Inheritance or not. In these cases the Legal Interest during the continuance of the Term is in the Termor; but the owner of the Fee is, in Equity, *entitled to all the benefit or advantage which can be made [*505 of the Term during its continuance; nor is the Termor permitted to obstruct the Owner in any acts of Ownership, or in making any Assurance of his Estate. In these respects, therefore, the Term accompanies the Inheritance. Nor can it, unless designedly (o), be disannexed. By a Will, therefore, not executed according to the Statute of Frauds, the Term (unless an

(g) Barrington v. O'Brien, 1 Ball & Beatty, 180.

(h) Lawrence v. Blatchford, 2 Vern. 457.

(i) For the various modes of barring Dower, see Mr. Butler's notes to Co. Litt. 216. a. and 381. b.

(k) Vid. Tiffin v. Tiffin, 2 Chan. Cas. 55.

(l) Willoughby v. Willoughby, Ambler.

28. And see what Mr. Fearn says, 2 Coll. Jur. No. 6.

(m) As to Will, see Wynch v. Packington, 2 Eq. Abr. 507. 1 Bro. P. C. 372, and cited as authority in Hewitt against Wright, 1 Bro. 90.

(n) See Best v. Stamford, 1 Salk. 154. Hayter v. Rod, 1 P. Wms. 373.

(o) Hayter v. Rod, 1 P. Wms. 359.

intention to pass the Term is clearly expressed) (*p*) is not severed from the Inheritance, nor will it pass, as the Inheritance does not pass (*q*). It follows the descent of the Inheritance to the Heir, and on the death of the Ancestor vests in his personal Representative for the Heir's benefit (*r*); but he has it, it seems, as a Term, which must go in a course of Administration, and not in a course of Descent (*s*), nor is it ever severed in favour of an Heir or Executor, though it seems, there are cases where it has been done in behalf of Creditors (*t*).

Though a Term cannot be entailed, yet it may wait on the Inheritance which is entailed, and when it is thus limited it is not properly an Entail within the Statute *de donis*, but governable partly by Equity, and partly by Law (*u*).

*506] Where a Term was created, and no Trusts declared, *and the Estate was devised for Life, with Remainders over, the Court decided there was no resulting Trust as to the Term, but that it attended the Inheritance (*x*).

It follows all the alienations made of the Inheritance, or of any partial Estate or Interest carved out of it by *Deed*, by *Will*, or by *act of Law* (*y*). It is an excrescence of the Inheritance, and affected in the same manner as the Inheritance, and governed by the same Uses (*z*). It is real Assets if it attends an Inheritance in Fee; but not if it attend an Estate-Tail (*a*); and is, as against the Heir (*b*), or Assignees of a Bankrupt (*c*), subject to Dower (*d*).

It is not, by the custom of London, reckoned as a Chattel, and divisible as such among Children (*e*). If one takes a Mortgage, and afterwards purchases the Inheritance, the Term waits on the Inheritance. So if the Inheritance be first purchased and afterwards the Term, the same attends the Inheritance (*f*).

The principal advantage derivable from these outstanding terms consists in the *security* they afford to *Purchasers*.

*507] *For where a Person purchases an Estate, or takes a

(*p*) See 9 Mod. 127. 2 Collect. Jurid. 276. quot. Sugd. Vend. & Purch. 362.

(*q*) Villiers v. Villiers, 2 Atk. 72. S. C. Barn. 307. Tiffin v. Tiffin, 3 Ch. Cas. 3.

(*r*) Levet v. Needham, 2 Vern. 139.

(*s*) Levet v. Needham, 2 Vern. 140.

(*t*) Cooke v. Cooke, 2 Atk. 67; and see Willoughby v. Willoughby, 1 Duraf. & East, 766. Goodright v. Scales, 2 Wils. 331.

(*u*) 3 Cha. Cas. 3, &c.

(*x*) Sidney v. Miller, Coop. Rep. 206, overruling the dictum in Browne v. Jones, 1 Atk. 191.

(*y*) Vid. Willoughby and Willoughby, 1 T. Rep. 763. Swannock and Lifford, Co. Lit. 290 b. n. 1 sec. 13, and Maun-

drell v. Maundrell, 7 Ves. 567, and S. C. 10 Ves. 246. In these cases will be found all the leading doctrine on this subject.

(*z*) 3 Chan. Cas. 4, 10, 11. 23, 24.

(*a*) Attorney-General v. Sir G. Sandys, Hard. 489.

(*b*) Wray v. Williams, Prec. Ch. 151. 1 P. Wms. 137. Hard. 489. Lex Prætoriana, MS.

(*c*) Squire v. Compton, 9 Vin. Abr. 227. pl. 60.

(*d*) Dudley v. Dudley, Prec. Ch. 241. Williams v. Wray, 1 P. Wms. 137. Hill and Adams, 2 Atk. 209. Dormer and Fortescue, 3 Atk. 124.

(*e*) Rich v. Rich, 2 Chan. Cas. 160.

(*f*) — v. Langton, 2 Ch. Cas. 156.

Mortgage (g), and obtains an Assignment of an *outstanding Term* to a Trustee, he is thereby secured against all Estates, Charges, and Encumbrances, (except Crown Debts) (h) by specialty (i), upon the purchased Estate, created immediately between the time of granting, or to speak technically, the raising of the Term and the period of the Purchase (k). This Rule in Chancery, it is said, is in maintenance of the Common Law where the maxims which refer to Descents, Discontinuance, Non-claims and Collateral Warranties, are only the wise arts and inventions of Law, to protect and quiet the Possession, and strengthen the right of Purchasers (l); but a Purchaser to avail himself of the benefit of such outstanding Term must have paid **a va- [*508 luable consideration*;—his purchase must have been *fair*;—he must have had *no notice*, either *express* or *implied* (m),—and have the *first and best right* to call for the legal Estate of the Term (n).

With regard, however, to *notice express* or *implied*, there is, in the case of a *Dowress*, a notable exception to the generality of the doctrine before laid down; for though the Purchaser of an Estate has notice that the Individual of whom he purchased was married, and, consequently that if the Wife survived her Husband, a right to Dower would attach, yet if the outstanding Term be assigned to a Trustee for the Purchaser, (it would be different if the Term, instead of being assigned, were suffered to remain with the Vendor's Trustee) (o), the Vendor's Wife cannot sub-

(g) See *Evans v. Bicknell*, 6 Ves. 184. *Robinson v. Davison*, 1 Bro. C. C. 63.

(h) *Nicholls v. Howe and others*, 2 Vern. 390. S. C. Prec. Ch. 125. *King v. Smith*, mentioned in Sugd. on Vend. & Purch. 347, and Appendix of same Work, No. 15. S. C. 1 Wight. 34.

(i) *King v. Smith*, 1 Wight. 34. The Law may, perhaps, be considered as settled, but as Mr. Preston observes (on Merger, p. 465,) "The decision on this point was contrary to the prevailing opinion of the Profession, an opinion which had long regulated their practice." In an opinion I have of Sir James Mansfield, when Solicitor-General, dated 9 Feb. 1782, he says, "I am informed (on a search directed by him) that no Instances of the seizure of a Trust-Estate are to be found, nor any in which a Trust-Estate of such a Debtor fairly parted with to a Purchaser, without notice, has been deemed to be liable to the Debts of the Crown, and in consequence of this Information my opinion now inclines (he had before given a different opinion) in favour of a Mortgagee: and

of that opinion was Mr. Kenyon.

(k) See *Willoughby and Willoughby*, 1 T. R. 768; and see also *Basset v. Nosworthy*, Finch Rep. 102, where the doctrine is well stated, and was approved by Lord Rosslyn in *Jerrard and Saunders*, 4 Bro. C. C. 457. *Saunders v. Dehew*, 2 Vern. 271. *Evans v. Bicknell*, 6 Ves. 184. *Robinson v. Davison*, 1 Bro. C. C. 63.

(l) Prec. Chan. 249, &c.

(m) A Purchaser, therefore, of an equitable Estate with an outstanding term, should never search for Judgments, for thereby he fixes himself with notice.

(n) See *Willoughby v. Willoughby*, 1 Tr. R. 768; and see also *Basset v. Nosworthy*, Finch Rep. 102, where the doctrine is well stated, and was approved by Lord Rosslyn in *Jerrard and Saunders*, 4 Bro. C. C. 457. *Saunders v. Dehew*, 2 Vern. 271. *Evans v. Bicknell*, 6 Ves. 184. *Robinson v. Davison*, 1 Bro. C. C. 63.

(o) *Maundrell v. Maundrell*, 7 Ves. 597. S. C. on Rehearing, 10 Ves. 246.

stantiate a claim of Dower (*p*). But this is an anomalous case, not reconcilable with the ordinary principles of Equity, and the determination can only be vindicated by the consideration that *509] such had long been the practice of Conveyancers, *and that a different decision would have shaken many titles (*q*).

If the Vendor of an Estate *conceals* from the Purchaser the existence of an outstanding Term, a fine levied by the Vendor to the Purchaser, with five years non-claim, will bar the Assignee of the Term, and the Trust passes inclusively in the Fine; but if a Purchaser *knows* of an outstanding Term, and it is agreed that the Term should be assigned in Trust for the Purchaser, in such case, though the Vendor levies a Fine to the Purchaser, the Fine will operate on the *Inheritance only*, and not on the *Term*; such being the plain intent of the Parties (*r*).

Where Terms are raised by Settlements for family purposes, it is usually provided (always in well-drawn deeds), that if the Trusts never arise, or become unnecessary, or incapable of taking effect, or are performed, that the Term shall cease; and in such events the Term, of course, ceases, according to the express provision of the Deed.

Another manner in which a Term may cease is by way of *Merger*. Thus, if a Term, of years and the Inheritance meet in one person, *in the same right*, the Term becomes extinct (*s*). But this Rule holds only where the legal and equitable Estates are co-extensive and commensurate; and not where he has the whole legal Estate, and only a partial equitable Estate (*t*). So, *510] where a term of years is held in *one right*, and the Inheritance in *another* (*u*), the Term does not merge.

It has been held, that where the Term and the Freehold would, if legal Estates, merge, by being vested in the same Person, the Term in Equity in such case is construed to attend the Inheritance, unless there be a declaration, or other act, to evince an intention to sever them (*x*).

Although terms may have ceased, it is a prudent rule with Conveyancers to recommend that nearly all terms for years, however ancient they may be, and whatever adverse possession or fines there may have been, should be required by a Purchaser

(*p*) See *Wynn v. Williams*, 5 Ves. 134; *Maundrell v. Maundrell*, 7 Ves. 507, and 10 Ves. 271, S. C. MS. the decision of Lord Somers, on which this doctrine is grounded, was affirmed in the House of Lords, *Lady Radnor v. Vandebendy*, Show. P. C. 69. Prec. Ch. 65. 1 Eq. C. Abr. 219; and see *Hill v. Adams*, 2 Atk. 208. S. C. Amb. 6, under title of *Swannock v. Lyfford*, See also Co. Litt. 208, a. note 105.

(*q*) See *Lady Radnor v. Vandebendy*, Prec. Ch. 65. Shower's Parl. Cases, p. 67.

(*r*) *Inham v. Morrice*, Cro. Car. 109. *Dighton v. Greenvil*, 2 Vent. 329, and Sugden's "Law of Vendors and Purchasers," p. 355, 5th Edit.

(*s*) See *Cooke v. Cooke*, 2 Atk. 67. *Wade v. Foget*, 1 Bro. C. C. 363.

(*t*) *Phillips v. Brydges*, 3 Ves. 126.

(*u*) 1 Inst. 338 b. *Gong and Radford*, Hob. 3. 9 East, 372.

(*x*) *Kelly v. Power*, 2 Ball & Bea. 253. *Capel v. Girdler*, 9 Ves. 509; in which case *Scott v. Fenhoulett*, 1 Bro. C. C. 69, is shown to be incorrectly reported.

to be assigned to him, or to a Trustee of the Purchaser's nomination, to attend the Inheritance (y).

It has been held *at Law*, that a *satisfied* Term should not be set up in Ejectment; and that where a Term is satisfied, it may be put as a question to the Jury, whether an assignment may not be presumed (z); but this doctrine has been much objected to as an innovation, and as injurious to the rights and benefits which previously accrued by means of outstanding Terms, to Purchasers and Mortgagees (a), and may now be considered as exploded (b), except where it is sought to non-suit a [*511 Plaintiff by a Term standing out in his own Trustee, or where a satisfied Term is set up by a Mortgagor against a Mortgagee, in which cases a Jury will be directed to presume a Surrender (c). The Re-conveyance of a legal Estate has, even in Equity, been presumed, after a great lapse of time, 140 years, for instance (d); but although this case was very particularly circumstanced, the Decision, it is said, "has not met with the approbation of the Bar" (e).

III. Conveyances by way of Mortgage, or otherwise, for Payment of Debts.

THE practice of Mortgaging seems to have been introduced into England about the time of Henry 3. It was inconsistent with feudal notions; nor does any thing of the kind appear during the rigid prevalence of that system (f); but when Henry 3 gave license for alienation, the two modes of mortgaging, distinguished by Lyttleton (g), *vadium vivum*, and *vadium mortuum*, appear to have been adopted. The Jurisdiction, however, of the Chancellor in cases of Mortgage must not be referred to this early period, for Sir Matthew Hale observes, that in the 14 Richard 2, the Parliament would not admit of *Redemp- [*512 tion (h); nor is it clear when the right of Redemption, which gave the Court of Chancery Jurisdiction in Cases of Mortgage, was first established (i).

The first Rule which presents itself on this subject is, that in

(y) See Sugden's Vend. and Purch. 356, 5th Edit.; and see 6 Ves. 184.

(z) Vid Doe on dem. Bristowe v. Legg, 1 T. R. 758. n. Doe on dem. Hodsden v. Staple, 2 T. Rep. 684. Doe on dem. Da Costa v. Wharton, 8 T. R. p. 2.

(a) Evans v. Bicknell, 6 Ves. 184, 5. Hilary v. Waller, 12 Ves. 251. Shannon v. Bradstreet, 1 Sch. and Lefr. 70.

(b) Lee and Wallwyn, 9 Ves. 31; and see 5 East, 138. I have left the passage in the Text as it was in the first Edition, though I am aware a different doctrine has recently been promulgated in Doe on the dem. of Putland v. Hilder, K. B.

Trin. T. 59 Geo. 3.

(c) Lade v. Holford, Buller's N. P. 210. Doe v. Staple, 2 Tr. 696. Doe v. Sybourn, 7 T. R. 2. Goodtitle v. Jones, 7 T. R. 47. Roe v. Reade, 8 T. R. 119.

(d) Hilary v. Waller, 12 Ves. 239.

(e) Sugden's Vend. and Purch. 295. Ed. 5.

(f) Treat. of Equity, B. 3 Ch. 1. s. 1.

(g) Sec. 332. Co. Litt. 205.

(h) Rot. Parl. vol. 3. p. 259.

(i) See Mr. Fonbl. note to Treat. of Eq. 2 vol. p. 256. n. c.

Equity a Mortgagee is only considered as a *Trustee* (i), (1) and that a Mortgage, as in Civil Law (k), is but a Security for the Money lent (l), and passes only a Chattel Interest, and does not alter the thing it conveys. (2) In the contemplation of a Court of Equity nothing real passes to the Mortgagee, and the Mortgage conveys nothing in the Land; (3) neither *Dower*, or *Tenancy by the Curtesy* (m). So much is it considered as a mere Chattel Interest, that Lands mortgaged to a Testator do not pass under a general Devise by him of his Lands (n); (4) nor are Mortgagees out of Possession allowed to vote on Elections (o). The *Equity of Redemption* is considered as an Estate in the Land, and may be devised (p), granted, or entailed with Remainders, and such Entail and Remainders may be barred by a Fine and Recovery, and a Husband may be Tenant by the Curtesy of it (q). (5)

*513] *If an *Advowson* be mortgaged, and is absolute in the Mortgagee, and becomes void, the Mortgagee, it seems, at Law, is entitled to present (r), he having the legal Estate; but a Court of Equity will compel him to present such Person as the Mortgagor shall nominate (s). But though, until Foreclosure, the Mortgagor presents, yet where there was an express Covenant

(i) 3 Ch. Ca. 3 Prec. Ch. 99.

(k) Dig. lib. 13. tit. 7. s. 8.

(l) 1 Ch. Cas. 285.

(m) Sparrow v. Hardcastle, cited 2 Ves. jun. 433. As to the claim of Dower by the Wife of a Mortgage in Fee, see 2 Black. Com. 158 1 Inst. 215 a. note 1. 3 Cro. 190, 1.

(n) Wince v. Littleton, 1 Vern. 3.; and see 2 Vern. 625.

(o) See 7 & 8 Will. 3. c. 25 s. 7.

(p) Pettat v. Ellis, 9 Ves. 563.

(q) Casbourne v. Scarfe, 1 Atk. 603.

S. C. Cases temp. Hard. 400. S. C. when at the Rolls, MS. where Sir Joseph Jekyll held there could not be a Tenancy by the Curtesy of an Equity of Redemption; and see 2 Eq. Abr. 594, as to Tenancy by the Curtesy: see Roberts and Dixwell, 1 Atk. 608.

(r) Dyer v. Lord Craven, 1 Dick. 662.

(s) Croft v. Powell, Com. Rep. 609. arg. o. Amburst v. Dawling. 2 Vern. 401. Makensie v. Robinson, 3 Atk 559. Jory v. Cox, Prec. Ch. 71.

(1) Vide Jackson v. Delancy, 13 Johns. Rep. 537.

(2) Vide Jackson v. Willard, 4 Johns. Rep. 41. Hitchcock v. Harrington, 6 Johns. Rep. 290. Collins v. Torry, 7 Johns. Rep. 278. Runyan v. Mercereau, 11 Johns. Rep. 534. Titus v. Neilson, 5 Johns. Ch. Rep. 452.

The mortgagor is the owner of the land, before foreclosure, and is to be regarded as such, for every purpose, except as to the right of possession: Thus, the owner of real estate, may gain a settlement, though it be mortgaged to secure the purchase money. Barkhamsted v. Farmington, 2 Conn. Rep. 600.

(3) Vide Leonard v. Borworth, 4 Conn. Rep. 421.

(4) In New-York, it has been decided, that the interest of a mortgagee, will pass under general words in a will, relating to realty, unless it can be collected from other expressions, or the purposes and objects of the testator, that his intention was otherwise. Jackson v. Delancy, ut supra.

(5) A mortgagor in possession of land mortgaged in fee, before foreclosure, or entry by the mortgagee, has, except in regard to the mortgagee, the legal seisin, and the equity of redemption may be sold in execution; and on the death of the mortgagor, while in possession, and before foreclosure, his widow may have dower of the land mortgaged. And here, the rule at law, and in equity, is the same. Vide Jackson v. Willard, Hitchcock v. Harrington, Collins v. Torry, Runyan v. Mercereau, Titus v. Neilson, ut supra. Punderson v. Brown, 1 Day, 93.

in the Mortgage Deed, that the Mortgagee shall present to fill up all the Avoidances until discharged, it was decreed for the Mortgagee (*t*). The reason why in the absence of an express Covenant a Mortgagee is not allowed for his own benefit to present to a Living, though he be in Possession, and there be no other Security than the Advowson, and the Mortgagor neglects to pay Interest, is because the Presentation is a Profit arising from the mortgaged Estate for which the Mortgagee cannot give credit in account upon a Redemption (*u*). If, however, a Mortgagee presents, the Court will not, after the statutable period, disturb the Presentation (*x*).

When upon Mortgage the Money is made payable to the Heir or Executor, in such case, before, or at the day of payment, the Mortgagor has an election to pay it to which he pleases (*y*); but after the *day of payment is over. (unless there be a [*514 re-en-feoffment) (*z*), and the Mortgage is forfeited at Law, though Equity gives the Mortgagor relief, so as upon payment of the Money he shall have his Land, yet Equity will not revive the election of the Mortgagor to pay it to the Heir or Executor, but he must pay it to the latter (*a*). But if in the Mortgage neither Heir nor Executor be mentioned, then after the death of the Mortgagee the Law determines it to be paid to the Executor (*b*). It has been held, that if there be a Mortgage in Fee, and two descents cast, and more due upon it than the value, and the Mortgagor refuses to redeem, yet it shall go to the Executor and not to the Heir, the Equity of Redemption not being foreclosed or released (*c*).

A practice has recently been introduced of conveying Lands by way of Mortgage to a third Person, agreed upon by the Mortgagor and Mortgagee, in Trust, upon non-payment of the Mortgage Money at the time agreed upon for its repayment, and a certain number of days notice, to sell, mortgage, or lease the mortgaged Estate, so as to satisfy the Mortgage, with the usual Covenants where a Power of Sale, &c. is given to Trustees, and a Covenant from the Mortgagor to join in such Sale, &c. but his joining not to be deemed essential to the Title (*d*). This enables a Mortgagee easily and *expeditiously to obtain [*515 the Money lent without the delay, expense, and difficulties at-

(*t*) *Gardiner v. Cooke*, Dom. Proc. 51 Jan. 1728.

(*u*) *Gubbins v. Creed*, 2 Sch. & Lefr. 218.

(*x*) *Gardiner v. Griffiths* 2 P. Wms. 404, recognised in *Mutter v. Chauvel*, 1 Meriv. 493.

(*y*) Co. Litt. 200 a. *Anon.* Freem. 20. *Rightson v. Overton*, *ibid.* p. 20; *Canning v. Hickes*, 1 Vern. 412, S. C. 2 Ch. Cas. 187; and see 1 Ch. Rep. 283. 2 Ch. Rep. 220.

(*z*) See *Rightson v. Overton*, 2 Freem. 21.

(*a*) *Culpepper v. Austin*, 2 Chan. Cas. 221.

(*p*) *Anon.*, 2 Freem. p. 12. *Rightson v. Overton*, *ibid.* p. 20.

(*c*) *Tabor v. Grover*, 2 Vern. 367. S. C. 2 Freem. 227.

(*d*) See *Clay v. Sharpe*, 18 Ves. 346, in note. S. C. *Sugden's Vend. and Purch.* in Appendix, p. 20, last Edition, and *Corder v. Morgan*, 18 Ves. 344.

tending a Bill of Foreclosure. This mode of mortgaging is seldom resorted to except in small Mortgages, but it might, it seems, with great advantage be adopted in all cases of Mortgage; it being often of great importance to the Mortgagee to have his Money at the time agreed upon for its repayment, and by this mode he may obtain it as soon as a Sale of the Premises is effected. It is not necessary, though it seems advisable, that a Trustee should be interposed, for the same Powers of Sale may be given to the Mortgagor (e). (1)

A Mortgage of a Ship at Sea (the forms required by the Register Acts being observed) has been held to be valid (f). (2)

The principal occasions on which the attention of Courts of Equity is called towards Mortgages, is upon Bills filed, 1. To Redeem; or 2 To Foreclose; and in respect to what are termed, 3. *Equitable Mortgages*.

1. An Equity of Redemption is considered as a Title in Equity, and not merely as a Trust, from which in many respects it materially differs (g). Sir *Matthew Hale* says, "a Power of Redemption is an equitable right inherent in the Land, and binds *516] all Persons in the *post* or otherwise; because it is *an ancient right which the Party is entitled to in Equity" (h).

The right to *redeem* a Mortgage is carefully protected by Courts of Equity, and they will not suffer any Agreement in a Mortgage Deed to prevail, that the Estate shall become an absolute purchase in the Mortgagee upon any event whatever (i); and the reason is because it puts the borrower too much in the power of the lender, who being distressed at the time, is too

(e) *Corder v. Morgan*, 18 Ves. 344. By the Civil Law, in case the Mortgage Money was not paid at the stipulated time, the Creditor was empowered to sell the Pledge, allowing the Debtor two years after notice given to redeem it. Inst. 11. tit. 8. s. 1. *Halifax Anal. Civil Law*, 64.

(f) *Thompson v. Smith*, 1 Madd.

Rep. 395.

(g) *Tucker v. Thurstan*, 17 Ves. 133.

(h) *Pawlet v. Attorney-General*, Hard. 465.

(i) See *Howard v. Harris*, 1 Vern. 190. S. C. 2 Ch. Ca. 61. 147. *Treatise of Eq.* 2 vol. 259. *James v. Oades*, 2 Vern. 402. 2 Ventr. 365.

(1) A power of sale continued in a mortgage, is an authority coupled with an interest, and is not, therefore, revoked by the death of the mortgagor. *Bergen v. Bennett*, 1 Cains' Cas. in Error, 1.

Where the mortgagee proceeds to sell mortgaged premises, after a tender of the debt and costs by a subsequent mortgage or judgment creditor, on the ground that another debt, not charged on the mortgaged premises, is due from the mortgagor to the prior mortgagee, such sale is irregular and void. *Burnet v. Denniston*, 5 Johns. Ch. Rep. 35.

A sale under a power in a mortgage, is equivalent to a foreclosure and sale under a decree in equity, and cannot be defeated to the prejudice of a *bona fide* purchaser, though the mortgage was given to secure the payment of an usurious debt. *Jackson v. Henry*, 10 Johns. Rep. 185. Vide *Bergen v. Bennett*, *ut supra*.

(2) To protect the mortgagee of a vessel from the general liability of owners for disbursements, it is necessary, either that he should not appear, from the ship's papers, to be the owner, or that his character as mortgagee should accompany the evidence of his title. *Starr v. Knox*, 2 Conn. Rep. 215.

inclined to submit to any terms proposed on the part of the Lender (k). (1)

No Agreement of the Parties can affect the doctrine as to Redemption in a Court of Equity (l). "You shall not," says Lord Eldon, "by special terms alter what this Court says are the special terms of that Contract (m)." But though any letters laid upon redeeming a mortgaged Estate, by some original Agreement, either in the Mortgage Deed, or a separate Deed, will not avail, where it is done with a design to wrest the Estate fraudulently out of the hands of the Mortgagor, yet if on Money advanced, an Estate be leased for 500 years, at a certain Rent for the three first years of the Term, and at another Rent for the Remainder of the term, with a proviso, that if at three years end the Money advanced, and Interest, is paid, then the Premises shall be reconveyed, this is a good Conveyance; and if [*517 the Money is not paid according to the proviso, the Interest granted will, it has been held, be irredeemably vested in the Party (n). So where the Grantee of Lands, subject to a limited Power of Redemption, has not all the remedies of a Mortgagee, the Conveyance is not a Mortgage but a conditional Sale; as, where some Lands were conveyed in lieu and satisfaction of a Portion charged on them, with a clause of Redemption, if the portion was paid in ten years, there being no Covenant for payment of the Portion, or any collateral Security, a Redemption was refused after the ten years; for if the produce of the Sale of the Lands were insufficient to discharge the Portion, the Grantee could have no remedy against the Grantor to recover the deficiency (o). (2)

If a Conveyance purports to be absolute, yet if he to whom it is made, agrees by writing under Hand and Seal to re-convey on being repaid his Purchase-money within a year or other period, it is considered as a Mortgage, and redeemable (p). So,

(k) *Toomes v. Conset*, 3 Atk. 261.

Ball & Bra. 278.

(l) See *Floyer v. Lavington*, 1 P. Wms. 268, and the cases cited in that case. *Newcombe v. Bonham*, 1 Vern. 7. S. C. 2 Ventr. 364; and 2 Ch. Ca. 58. *Comyn.* 349. *Goodman v. Grierson*, 2

(m) *Seton v. Slade*, 7 Ves. 273.

(n) *Mellor v. Lees*, 2 Atk. 494.

(o) *Goodman v. Grierson*, 2 Ball & Bea. 274.

(p) 2 Vern. 84.

(1) Vide *Holridge v. Gillespie*, 2 Johns. Ch. Rep. 30. *Conway's Exrs. v. Alexander*, 7 Cranch, 218, 235.

A sale or lease of part of the mortgaged premises by the mortgagee, before foreclosure, will not affect the right of the mortgagor to redeem; nor does it deprive the mortgagee of his right of foreclosure. *Wilson v. Troup*, 7 Johns. Ch. Rep. 25.

(2) So, if A. advance money to B., who, thereupon, conveys land to trustees, in trust, to convey the same to A. in fee, in case B. should fail to repay the money and interest on a certain day; and B. fails to repay the money, and the trustees, thereupon, convey the land to A., there being, in the conveyance, no acknowledgment of a pre-existing debt, and no stipulation for the repayment of the money, and no proposition for, or conversation about a mortgage, this is not a mortgage, but a conditional sale. *Conway's Exrs. v. Alexander*, 7 Cranch, 218, 235.

if an absolute Conveyance is made, and the Person to whom it is made instead of entering and receiving the Profits, demands Interest for his Money; and it is paid, this will be admitted to explain the nature of the Conveyance, and to prove that it was but a Mortgage (*q*). (1) If one mortgages Lands, with a Proviso that he himself, or the Heirs of his Body may redeem, yet so *518] *much is redemption favoured, that an Assignee may in such case redeem (*r*).

According to the Statute (4 and 5 Will. and Mary, c. 16, s. 2,) if any Person who hath suffered any Judgment, Statute or Recognizance, which may bring a charge on his Land, to be entered against him, Mortgages his Estate without giving notice of such prior encumbrances, such Mortgagor will not be entitled to the benefit of an Equity of Redemption; and the same punishment applies in case of a second Mortgage (unless there is fraud and unfairness in the second Mortgagee) (*s*). where the fact of a former Mortgage is suppressed; but the right to Dower is by the Act (s. 5.) saved to the Wife, if she does not join in such Conveyances.

What is called a *Welsh Mortgage* (a mode of Conveyance seldom resorted to,) is a perpetual Power of Redemption; subsisting, as stated by Lord Hardwicke, *for ever*; and where the Mortgagee cannot compel a Redemption, or a Foreclosure (*t*); but the same very eminent Judge observed in another case, that there are circumstances which may create a bar even in Mortgages of this description (*u*).

"It has been settled," says Lord Eldon, "as to *Welsh Mortgages*, by comparing them to Elegits, that length of time is no bar, as the nature of that sort of Mortgage is, that you should hold until such time as you shall be paid; but if you be permitted to *519] *hold twenty years after the Debt is paid, then such a holding may, *I think*, amount to saying, that you are bar-

(*q*) Prec. Chan. 526; and see 1 Vern. 108, 2 Freem. 280.

(*r*) 1 Vern. 31.

(*s*) 2 Vern. 589.

(*t*) Linget against Scawen, 1 Ves. 406. Orde v. Heming, 1 Vern. 418.

(*u*) Yates v. Hambly, 2 Atk. 363.

(1) A conveyance of land, intended merely as security for a debt, though absolute on the face of it, is a mortgage. *Dey v. Dunham*, 2 Johns. Ch. Rep. 182. S. C. on appeal, 15 Johns. Rep. 555. *James v. Johnson*, 6 Johns. Ch. Rep. 417. *Henry v. Davis*, 7 Johns. Ch. Rep. 40. Vide *Strong v. Stewart*, 4 Johns. Ch. Rep. 167.

And the intention of the parties may be shown by any writing subsequently executed, as a defeasance. *Dey v. Dunham*, *ut supra*. And though such defeasance be by parol, it will be sufficient, as between the parties themselves. *James v. Johnson*, *ut supra*. So, generally, parol evidence is admissible to show, that a conveyance or assignment, absolute on its face, was intended as a mortgage; as, that a loan was negotiated, and that the deed was made, given and received, by way of security. *Strong v. Stewart*, *ut supra*.

red, upon the same principle as if it were a Mortgage of an ordinary nature" (x).

All *Welsh* Mortgages, it is observable, are without a Covenant to repay the Mortgage Money (y).

It has been said to be a Rule, *once a Mortgage and always a Mortgage* (z); but where a Mortgagee has been in Possession twenty years, without any impediment in the Mortgagor to assert his title, such as Imprisonment, Infancy, Coverture, or being beyond Sea, (where it is not by having absconded,) or if such impediment has been removed ten years, it is a bar to a Redemption (a). And in such case, it seems, a *Plea* (b), or, where the length of time appears on the face of the Bill, a Demurrer, will lie to a Bill for an Account (c). And where *Infancy, [*520 Coverture, &c. are charged in the Bill to avoid the presumption of payment from length of time, it is not enough to say generally that there have been Infancies and Covertures (d). And though Infancy may be an Answer to the objection as to length of time in not coming to redeem, yet where the time begins upon the Ancestor, it will run on against his Infant Heir, as in the case of a fine at Common Law (e); and if a Feme Covert afterwards becomes discover, the Statute of Limitations runs from that time, though she marries again (f).

The Rule appears to have been first laid down by Lord Keeper *Bridgman*, and the Master of the Rolls, in *Pearson v. Pulley* (g), and it is not founded on a Presumption of an absolute Conveyance, but is merely a positive rule introduced for the sake of quieting the Title after so long a neglect to redeem, analogous to the Statutes of Limitations at Law (h). (1) If, however,

(x) This passage, in the judgment of *Fenwick v. Reed*, was extracted from a Note of the Judgment taken in Short-hand. It does not exactly correspond with the Report of that Case in 1 *Merivale*, p. 125; it there being stated, as determined, that length of time may be a bar in the case there put. I am not aware of any case in which it was so determined, except in that case.

(y) *Lawley v. Hooper*, 3 *Atk.* 280.

(z) *Newcombe v. Bonham*, 1 *Vern.* 8. *Howard v. Harris*, 1 *Vern.* 33. *James v. Oades*, 2 *Vern.* 402. *Grounds and Rudiments*, &c. 246.

(a) *Jenner v. Tracy*, mentioned in note B. to 3 *P. Wms.* 287; and see *Bonney v. Ridgard*, mentioned from a MS. note in 17 *Ves.* 99. S. C. but not to this point, 4 *Bro. C. C.* 125. *Trash v. White*, 3 *Bro. C. C.* 289. *Floyer v. Lavington*, 1 *P. Wms.* 268. *Anon.* 3 *Atk.* 313. *Corbett v. Barker*, 1 *Anstr.*

138; and see 3 *Anstr.* 759. *Hovendon v. Lord Annesley*, 2 *Sch. & Lefr.* 636. *Hodde v. Healey*, 1 *Ves. & Bea.* 539. contra *Leman v. Newman*, 1 *Ves.* 51. *Exton v. Greaves*, 1 *Vern.* 138. *Sibson v. Fletcher*, *Chan. Rep.* 60. *Hales v. Hales*, 1 *Chan. Rep.* 105. *Cooper*, 161. 189. *Redesd*, *Tr. Pl.* 174. n. (u.)

(b) See post.

(c) *Saunders v. Hord*, *Chan. Rep.* 184. *Esdell* against *Buchanan*, 4 *Bro. C. C.* 254. S. C. 2 *Ves. jun.* 84. *Jenner v. Tracy*, mentioned in note to 3 *P. Wms.* 287. *Hardy v. Reeves*, 4 *Ves.* 479. S. C. on appeal, 5 *Ves.* 426; but see 3 *Atk.* 225, 226.

(d) *Blewitt v. Thomas*, 2 *Ves. jun.* 671.

(e) *St. John v. Turner*, 2 *Vern.* 418.

(f) 2 *Atk.* 333.

(g) 1 *Chan. Cas.* 102.

(h) *Corbet v. Baker*, 1 *Anstr.* 138; and see 2 *Anstr.* 759. *Belch v. Harvey*, MS.

(1) Vide *Moore v. Cable*, 1 *Johns. Ch. Rep.* 385. *Giles v. Baremore*, 5 *Johns. Ch. Rep.* 545. *Skinner v. Smith*, 1 *Day*, 124. *Lockwood v. Lockwood*, 1 *Day*, 295.

there have been *acknowledgments* that the Estate was held in Mortgage, and accounts have been kept, a Possession even of thirty (*i*), forty (*k*), or fifty years (*l*), a Mortgage ever so old (*m*) *521] will *not bar Redemption. And if a man takes notice by a Will, or any other deliberate act (*n*) an answer, for instance, to a Bill in Chancery (*o*), or a recital in a Deed (*p*) that he is a Mortgagee, acknowledgments of that nature will take the case out of the rule that a Mortgagor shall not redeem after twenty years; and that, though the acknowledgment be in a Deed by the Mortgagee, a Surrender, for instance, of a Copyhold subject to the Mortgage, to which neither the Mortgagor or his Heirs are Parties (*q*), but the mere demand of an Account is not alone sufficient to prevent the effect of such a length of time (*r*); though the Settlement of an Account of what is due for Principal and Interest, is (*s*), unless it be by a Person not lawfully authorized (*t*). Parol Evidence may be adduced to show that it is a subsisting Mortgage, but such Evidence must be clear and unequivocal (*u*). It has been observed that, though no particular time is appointed for payment of the Mortgage Money, as in the case of Welsh Mortgages, where the Mort- *522] gagee is to enter and *hold until he is satisfied, length of time is, nevertheless, an objection to a Redemption (*x*).

Where the person to pay the Interest on the Mortgage is the same person who is to receive it, as, if Tenant for Life has conveyed his Life Estate to the Mortgagee, there the presumption does not arise, and though twenty years elapse, the Mortgage is redeemable (*y*).

The right of Redemption is not confined to the Mortgagor, his Heirs, Executors, Assignees, or subsequent Encumbrancers, but extends to all persons claiming any Interest whatever in the Premises, as against the Mortgagor. A person claiming under a voluntary Deed may redeem; for the Deed, though void as to a subsequent Mortgagee, is binding on the Mortgagor; a for-

(*i*) 2 Atk. 333.

(*k*) *Smart v. Hunt*, 4 Ves. 478, in note.

(*l*) See *Lake v. Thomas*, 3 Ves. 17; and see what is said in *Edsell v. Buchanan*, 2 Ves. jun. 84, S. C. 4 Bro. C. C. 256, and *Proctor v. Cowper*, 2 Vern. 377. S. C. Prec. Ch. 116.

(*m*) 1 P. Wms. 271. Anon. 2 Atk. 333. *Yates v. Hambly*, 2 Atk. 363.

(*n*) *Perrey against Marston*, 2 Bro. C. C. 399. This Decree was afterwards reversed, but on another point. See the observations on this case in *Reeks v. Postlethwaite*, Coop. 164. see also Anon. 3 Atk. 314. *Whiting v. White*, Coop. 4.

(*o*) *Proctor v. Oates*, 2 Atk. 140.

(*p*) 2 Bro. C. C. 399; and see *Carew*

v. Johnstone, 2 Sch. & Lefr. 295. and *Smart v. Hunt*, 4 Ves. 478, in note. *Hardy v. Reeves*, 4 Ves. 466. S. C. on Rehearing, 5 Ves. 426.

(*q*) *Hansard v. Hardy*, 18 Ves. 455; and see *Hardy v. Reeves*, 4 Ves. 466; *Daniell v. Golby* before Vice Chancellor Leach, 27 Feb. 1818. MS.

(*r*) *Hodds v. Healey*, 1 Ves. & Bea. 540.

(*s*) Anon. 2 Atk. 333.

(*t*) *Barron v. Martin*, Coop. 192.

(*u*) See *Whiting v. White*, 2 Cox, 290. S. C. Coop. 6 *Reeks v. Postlethwaite*, Coop. 171. *Barron v. Martin*, Ibid. p. 192.

(*x*) Ante 518. *Orn v. Heming*, 1 Vern. 418.

(*y*) *Corbet v. Barker*, 3 Anstr. 755.

tiori, may any person redeem who has acquired, for a valuable consideration, an Interest in the Land; a Tenant under the Mortgagor, for instance, or a Tenant by Elegit, Statute Merchant, or Staple, or Tenant by the Curtesy, or in Dower, or a Jointress; and the Crown may also redeem Estates mortgaged, and afterwards forfeited by the treason, or otherwise, of the Mortgagor (z). (1)

An Equity of Redemption is subject to Crown Debts, and may be sold under an extent (a). It cannot be affected by an Execution (b); but a *Judgment-Creditor may redeem (c) [*523 provided he has taken out Execution (d).

In those cases where a Mortgage is sought to be redeemed, the doctrine as to what is termed *Tacking*, frequently comes under consideration.

Tacking is prevented in *Ireland* by the effect of the Register Act in that country (e), (2) but in *England* it is a rule (and it has great appearance of hardship, though fully established) (f), that if a third Mortgagee buys in the first Mortgage, he acquires a Title in Law, and having equal Equity, will, in the language of the Cases, *squeeze out the second Mortgagee*, provided such third Mortgagee, *when he lent his Money*, had no notice of

(z) See 1 Fonb. Trea. Eq. 267, n. p. and the Authorities there cited, 1 Inst. 108a. n. 1.

(a) See 25 Geo. 3. c. 35. King v. Delamotte, Forest's Rep. 162.

(b) Lyster v. Dolland, 3 Bro. C. C. 478.

(c) Burdon v. Kennedy, 3 Atk. 739.

King v. Manical, 3 Atk. 192. Sharp v. Earl of Scarborough, 4 Ves. 542.

(d) Shirley v. Watts, 3 Atk. 200.

(e) 6 Anne, c. 2, vid. Latouch v. Lord Dunsany, 1 Sch. & Lefr. 157. Bond and Hopkins, 1 Sch. & Lefr. 430.

(f) 2 Vez. 573.

(1) No person can come into a court of equity to redeem a mortgage, unless he is entitled to the estate of the mortgagor, or has a subsisting claim under it: Thus, where lands were mortgaged to secure a debt; and afterwards, the mortgagor, without specifying the mortgaged premises, with two other persons, his co-partners in trade, on a composition with these creditors, assigned all their estate, real and personal, to certain trustees, in trust, for the payment of their debts, and to the survivors and survivor of them, and the heirs of such survivor; it was held, on a bill to redeem, filed by the heirs and executors of a surviving trustee, that after the lapse of more than 30 years, it must be presumed, that the debts of the assignors had been paid, and the objects of the trust satisfied; and that the heirs of the trustee had no interest which would entitle them to a redemption; and that the equity of redemption, if any existed, remained in the heirs of the mortgagor. *Grant v. Duane*, on appeal, 9 Johns. Rep. 591.

(2) The registry acts in the United States, have the same effect, as to registered mortgages. Vide *Grant v. Bissett*, 1 Caines' Cas. in Error, 112. But the registry of a mortgage is notice to subsequent purchasers, &c. only to the extent of the sum specified in the registry, though the mortgage was given to secure a larger sum; as where the sum to be secured was expressed to be 3000 dollars, and by mistake of the clerk, was registered for 300 dollars. *Frost v. Beakman*, 1 Johns. Ch. Rep. 28. S. C. on appeal, 18 Johns. Rep. 544. Yet, actual notice of the sum mentioned in the mortgage, is sufficient, as to purchasers or payments, subsequent to such notice. *Ib.*

the second Mortgage (*g*). And the rule is the same, even though the third Mortgagee buys in the first Mortgage pending a Bill brought by the second Mortgagee to redeem the first (*h*), unless the Suit has proceeded so far as a Decree, and a direction to settle Priorities (*i*).

*524] *A third Mortgagee may buy in the first Mortgage and tack, though the second Mortgage was registered, unless when he bought in the first Mortgage, he had actual notice of the second Mortgage (*k*).

But a prior Mortgagee who has an Assignment of a third Mortgage as a Trustee only (*l*), or who has a Mortgage of the Equity of Redemption coming to him as Executor (*m*), cannot tack the two Mortgages to the prejudice of intervening Encumbrancers.

If a *Judgment-Creditor*, or *Creditor by Statute or Recognizance*, buys in the first Mortgage, he cannot tack or unite this to his Judgment, &c. and thereby gain a preference; for he did not advance his Money on the Credit of the Land (*n*); but if a third Mortgagee buys in a Statute, (and holds both in the same right) (*o*), he is allowed to unite the Statute to his third Mortgage, for the Land was in the view and contemplation of the Lender (*p*); and the Judgment-Creditor by virtue of an *Elegit* might bring an Ejectment, and hold upon the extended value; and as he has the legal interest in the Estate, the Court will not take it from him (*q*), and this, whether the Statute were paid off or not (*r*).

If a first Mortgagee lends a further Sum to the Mortgagor (*s*) *525] upon a Statute or Judgment, he may *retain, not only against the Mortgagor, but against a mesne Mortgagee, (provided he had no notice of such mesne Mortgage) till both the Mortgage, Statute, or Judgment, be paid (*t*). So if money be lent, and afterwards, on a further advance, a Mortgage is made to secure

(*g*) Anon. Freem. 2 vol. 6; and the S. P. p. 14. The rule was also solemnly laid down in *Marsh v. Lee*, 2 Vent. 337. S. C. 1 Chan. Ca. 172, wherein that great man, Sir M. Hale, (then Chief Baron,) was called by the Ld. Chancellor to his assistance. See also *Edmonds v. Povey*, 1 Vern. 187. 2 Vern. 156. *Morret v. Pask*, 2 Atk. 52. *Brace v. Duchess of Marlborough*, 2 P. Wms. 491. 495. Prec. Ch. 249. *Bacon's Tracts*, 55. *Cas. Temp. Finch*. 409. *Toulmin v. Steere*, 3 Meriv. 224.

(*h*) *Hawkins v. Taylor*, 2 Vern. 29. *Turner v. Richmond*, 2 Vern. 81. 2 P. Wms. 491. *Belcher v. Butler*, 1 Eden, 530.

(*i*) *Wortley v. Birkhead*, 2 Ves. 571. S. C. 3 Atk. 811; and see *Earl of Bristol v. Hungerford*, 2 Vern. 524. *Ex parte Knott*, 11 Ves. 619. *Redeem. Tr.*

Pl. 168, 3d Edit.

(*k*) *Cator v. Cooley*, 1 Cox, 182.

(*l*) *Morret v. Paske*, 2 Atk. 53.

(*m*) *Barnet v. Weston*, 12 Ves. 130.

(*n*) *Wright v. Pilling*, Prec. Ch. 494.

Brace v. Duchess of Marlborough, 2 P. Wms. 491. 493.

(*o*) *Morret v. Paske*, 2 Atk. 53. *Stan- ton v. Sadler*, 2 Vern. 30.

(*p*) *Higgon v. Syddal*, 1 Ch. Ca. 149, noticed in *Brace v. Duchess of Marlbo- rough*, 2 P. Wms. 493, 4.

(*q*) *Morret v. Paske*, 2 Atk. 53.

(*r*) Anon. 2 Chan. Cas. 208.

(*s*) *Matthews v. Cartwright*, 2 Atk. 347; and see 3 Salk. 84. 1 Chan. Cas. 2.

(*t*) 2 P. Wms. 494; and see *Shepherd v. Tilley*, 2 Atk. 352. Mr. Freeman puts a similar Case, 2 Freem. p. 7. *Baker v. Harris*, 16 Ves. 399.

the same, the Mortgagor (u), nor his Heir after his death (x), cannot redeem without paying all the Money due (y); and though the Mortgage is obtained by Assignment, the Mortgagor cannot redeem without paying Money lent to him previously by the Assignee (z). A distinction, therefore, is apparent, between a Bill to *redeem*, and a Bill to *foreclose*; for in the latter case the Mortgagee cannot insist on tacking his subsequent Debt, as he may do on a Bill for a Redemption (a).

Where there are subsequent Encumbrances or Creditors in the case, there, a Man that buys in a prior Encumbrance shall be allowed only what he really paid, though there was in truth a greater Sum due upon such prior Encumbrance; but where the Mortgagor or his Heir comes to redeem, there is no reason that he should have the benefit of a good Bargain made by another Man, and must therefore pay what is really due on the Mortgage, whatever it be, without respect to what the Assignee paid (b).

*Where a first Encumbrancer by Judgment, has likewise [*526 a Mortgage, though there is another Judgment prior to the Mortgage, yet if the Mortgagee had no notice of it the Court will not direct a Sale of the Estate in favour of the Creditor, upon the second Judgment, unless he will pay off the Principal and Interest of the first Judgment and Mortgage (c).

It has been held that a Mortgagee is not permitted to tack, as against Assignees in Bankruptcy, a Mortgage *subsequent* to an act of Bankruptcy, though without notice, and previous to the Commission (d), for by such Mortgage no Interest passes (e); but it is apprehended that, under the 46 Geo. 3. c. 135, if the subsequent Mortgage was made *bona fide* two months before the date of the Commission, without notice of any prior act of bankruptcy, or that the Mortgagor was insolvent or had stopped payment, the same might be tacked.

An Heir, or the Devisee of Mortgaged Premises (f), (unless it be a Devise for payment of Debts) (g) cannot redeem a Mortgage without paying a Bond (h), though there is no Judgment; and this, to prevent a circuitry of Action; but that Equity does

(u) 2 Chan. Rep. 247.

(x) 1 P. Wms. 776.

(y) 2 Ch. Rep. 247.

(z) 2 Ch. Rep. 360.

(a) See the note to Coleman v. Winch, 1 P. Wms. 776; and Morret v. Paske, 2 Atk. 53. Archer v. Snatt, 2 Str. 1107. Anon. 2 Ves. 262.

(b) Williams v. Springfield, 1 Vern. 476, and see Darcy v. Hall, 1 Vern. 49. Phillips v. Vaughan, 1 Vern. 336. Ascoug v. Johnson, 2 Vern. 66; and see Francis's Max. Eq. p. 9, and the Cases there cited.

(c) Sir H. Smithson v. Thompson, 1 Atk. 520.

(d) Archer v. Snatt, 2 Str. 1107. see 2 Black. Rep. 726.

(e) Ex parte Knott, 11 Ves. 636.

(f) 3 Atk. 630; and see Ambl. 686.

(g) Heames v. Bance, 3 Atk. 630. Price against Fastnedge, Ambl. 686.

(h) Coleman v. Winch, 1 P. Wms. 775. Anon. 2 Ves. 662. Shuttleworth v. Laycock, 1 Vern. 245. Ambl. 685. Grounds and Rudiments of Law and Equity, 65. 2 Chan. Cas. 164.

not prevail against a Purchaser, an Assignee of the Equity of *527] *Redemption, for instance (i); the Bond-Creditor having no Lien upon the Land (k); nor can he tack where there are intervening Encumbrances of a superior nature between his Mortgage and the Bond (l); nor can a Bond be tacked to a Mortgage as against Creditors seeking to redeem after the death of the Mortgagor, though it may against the Heir (m).

If a Mortgagee in Fee lends Money to the Mortgagor on Bond, and the Mortgagor dies, and his Heir sells the Equity of Redemption, the Vendee may redeem the Land without paying the Bond Debt (n). So if an Executor files a Bill to redeem a Mortgage of a Term for years, he must pay a Bond Debt also due (o); but if the Equity of Redemption be assigned by the Executor, the Assignee may redeem without paying the Bond (p).

If the Heir of a Mortgagor of *Copyhold* Premises files a Bill to redeem, the Defendant cannot insist upon tacking a *Judgment*, because the Copyhold Lands are not liable to an Execution upon a Judgment (q).

*528] If Tenant for Life, Remainder to his Son in Tail, *Mortgages the Lands, and the Son afterwards borrows Money of the Mortgagee, and Mortgages his Interest in the Land, he may redeem without paying his Father's Mortgage (r).

It has been holden, that where A. had two Mortgages on different independent Estates of the Mortgagor, one, a deficient Security, and the other, more than sufficient, the Mortgagor cannot redeem the latter without making good the deficiency of the other Security (s); nor, where there are two separate Mortgages of different Estates to the same Person, can a Purchaser of the Equity of Redemption of one of them redeem that Mortgage only; if he redeems at all, he must redeem both (t). (1)

(i) *Coleman v. Winch*, 1 P. Wms. 775. *Troughton v. Troughton*, 3 Atk. 657. S. C. 1 Ves. 86; and see 2 Salk. 84.

(k) *Ex parte*, *Herbert* 13 Ves. 183, overruling *Collet v. Dr. Golls*, For. 66. see also 1 Sch. & Le Frov, 152.

(l) *Powis v. Corbet*, 3 Atk. 556.

(m) *Hamerton v. Rogers*, 1 Ves. jun. 513. *Lowthian against Hasel*, 3 Bro. C. C. 162; and see *Vanderzee against Willis*, 3 Bro. C. C. 23, *Coleman v. Winch*, 1 P. Wms. 776. *Hillier v. Wilkins*, in Chan. 16 July 1741, MS.; and see *ex parte Hooper*, 1 Meriv. 7.

(n) *Prec. Chan.* 89, 2 Str. 1107. 1 P. Wms. 775. 3 Atk. 668.

(o) See *Eccles v. Shawill*, *Prec. Ch.* 17.

(p) *Coleman v. Winch*, 1 P. Wms. 776. *Prec. Ch.* 511. *Vanderzee against Willis*, 3 Bro. 23.

(q) *Heir of Carron and Park*, *Vin. Abr. Tit. Copyhold*, (O. E.) Ca. 6. 6 *Vin.* 232.

(r) *Bromley v. Hammond*, 2 Chan. Cas. 23, Eq. p. 2, for he does not take the Estate as Heir to his Father.

(s) *Shuttleworth v. Laycock*, 1 Vern. 245. *Margrave v. Le Hooke*, 2 Vern. 207. *Pope v. Onslow*, 2 Vern. 286, and what is said Arg. 1 Vern. 29, and in 2 Ch. Rep. 23. see *vid.* observations on *Pope v. Onslow*, by Lord Hardwicke, in *ex parte King*, 1 Atk. 300.

(t) *Ex parte Curter*, *Ambl.* 733. *Heir of Carron v. Pack*, 6 *Vin.* 222; and see *Ireson v. Denn*, 2 Cox, 425. *Cator v. Charlton*, cit. 2 Ves. jun. 377. *Collet v. Munden*, cited *Ibid.* *Jones v. Smith*, 2 Ves. jun. 372. *Willis v. Lugg*, 2 *Eden's Rep.* 78, *contra*.

(1) *Vide Burnet v. Denniston*, 5 *Johus. Ch. Rep.* 35.

After the Foreclosure and Sale of a Mortgaged Estate, an Action by the Mortgagee for the balance opens the Foreclosure; but where the Mortgagee had taken possession a considerable time, and the balance was inconsiderable, a perpetual Injunction was decreed (u).

2. With respect to the *Foreclosure of a Mortgage*, it has been determined that a Mortgagee may file a Bill of Foreclosure, without taking Possession. A Mortgagee cannot be compelled to take *possession; for by so doing he would sub- [*529] ject himself to an account, which the Court will not force him to do (x).

After the death of the Mortgagor, in case the personal Estate of the Mortgagor is deficient, a Mortgagee may pray a Sale of the mortgaged Premises, in the first instance, where the Heir and personal Representatives are the same Person (y). (1)

Where an *Advowson* is mortgaged, instead of bringing a Bill of *Foreclosure*, the Mortgagee should pray a *Sale of the Advowson* (z).

A *Pawnee* of Stock is not bound to bring a Bill of Foreclosure of the Equity of Redemption of the Stock, but may sell it (a). And it has been held, that *Exchequer Annuities* (b), or *East India Stock* (c) mortgaged, may be sold upon notice, without a Bill of Foreclosure, which, it seems, would be dismissed (d). If the Mortgage be of a *reversionary* Interest in Stock, the Mortgagee by his Bill must pray, that the Money may be paid, or that a Sale shall be made, and then the Court will make the usual Decree, as in other Mortgages, for payment of the Mortgage-money; and if the Money is not paid as directed, a Sale takes place (e). But a Mortgagor of Stock may file a Bill for an account of what is due, and to have a transfer (f).

*A Mortgagee of a *Copyhold* Estate, who is not in pos- [*530] session, may bring his Bill against the Mortgagor, before admittance, for a Decree of Foreclosure, and after he has obtained such Decree may proceed in Ejectment for Possession of the mortgaged Premises (g).

(u) *Perry v. Barker*, 13 Ves. 198. S. C. MS.

(x) *Lord Pearhyn v. Hughes*, 5 Ves. 106.

(y) *Daniel against Shipwith*, 2 Bro. C. C. 155.

(z) *Maekenzie v. Robinson*, 3 Atk. 559.

(a) *Kempe v. Westbrooke*, 1 Ves. 278.

(b) *Tucker v. Wilson*, 1 P. Wms. 261, on Appeal, 1 Bro. P. C. 494.

(c) *Lockwood v. Ewer*, 2 Atk. 303.

(d) *Ibid.*

(e) *Ponten v. Page*, before Vice Chancellor Plumer, 7th Nov. 1816, MS.

(f) 1 Ves. 273.

(g) *Sutton v. Stone*, 2 Atk. 101.

(1) But real estate mortgaged, cannot be sold by the mortgagee, on default of payment, without a bill for foreclosure, and a decree for a sale. *Iditer* in the case of goods pledged, which may be sold on giving notice to the debtor to redeem. *Hart v. Ten Eyck*, 2 Johns. Ch. Rep. 62.

Where a Bill is filed to foreclose a Mortgage of an *Estate-Tail*, the Court does not compel the Tenant in Tail specifically to suffer a Recovery, but decrees him to make a good Title to the Mortgagor (*h*); but on a Covenant of Tenant in Tail Mortgagor, for *further assurance*, it be laid hold of as a ground to enforce a Recovery (*i*). A Decree of Foreclosure against a Tenant in Tail, or a release by him, is binding on his Issue (*k*).

Where a Trustee had laid out the Money of different Persons on a Mortgage, a Foreclosure was permitted by one *Cestui que Trust*, as to his share (*l*). And where a Mortgagee had assigned the mortgaged Property to a Person in Trust for three others, who each advanced a third of the Money, one of the three was permitted to file a Bill to foreclose, but the other two were considered as necessary Parties, they all being Joint-tenants (*m*). (1)

If a Bill filed by a Mortgagor for a Redemption is dismissed for non-payment of the Mortgage-money at the day appointed, such dismissal operates as a Foreclosure, and is equivalent to a *531] decree for a *Foreclosure (*n*); (2) but the dismissal of such a Bill merely for want of Prosecution, has not that effect (*o*).

If after a Foreclosure and a Sale, the Mortgagee brings an Action for the Balance, this, it has been held, opens the Foreclosure (*p*): (3) Where, however, the Mortgagee had taken Possession a considerable time, a perpetual Injunction was decreed (*q*).

Where a Mortgagee forecloses, and sells the Estate, and it proves insufficient to satisfy the Loan, he may resort to a Bond given at the same time with the Mortgage, for the residue (*r*). (4)

(*h*) *Sutton v. Stone*, 2 Atk. 101.

(*i*) *Tourle v. Rand*, 2 Bro. C. C. 650. *Pye and Daubuz*, 3 Bro. C. C. 595.

(*k*) *Reynoldson v. Perkins*, Amb. 564. *Hesparick v. Barton*, 1 Ch. Cas. 217.

(*l*) *Montgomerie v. the Marquis of Bath*, 3 Ves. 560.

(*m*) *Lowe v. Morgan*, 3 Ves. 368.

(*n*) *Stewart against Worral*, 1 Bro. C. C. 591. *Bishop of Winchester v.*

Payne, 11 Ves. 199. *Garth v. Ward*, 2 Atk. 174.

(*o*) *Hansard v. Hardy*, 18 Ves. 460.

(*p*) *Dashwood v. Blythway*, Eq. Cas. Abr. 317. Cas. temp. Finch, 406.

(*q*) *Perry v. Barker*, 8 Ves. 527; and S. C. 13 Ves. 198. S. C. MS.

(*r*) *Tooke v. Hartley*, 2 Bro. 125. S. C. 2 Dick. 785.

(1) All encumbrancers, or persons having an interest existing at the commencement of the suit, whether subsequent or prior in date, to the plaintiff's mortgage, must be made parties to a bill for foreclosure and sale, otherwise they will not be bound by the decree. *Haines v. Beach*, 3 Johns. Ch. Rep. 459.

(2) Vide *Perine v. Dunn*, 4 Johns. Ch. Rep. 140.

(3) Vide contra, *Dunkley v. Van Buren*, 3 Johns. Ch. Rep. 330.

(4) On a bill to foreclose a mortgage, the mortgagee is confined to his remedy on the mortgage; and the suit cannot be extended to other property, or against the person, in case the property mortgaged proves insufficient to satisfy the debt. *Dunkley v. Van Buren*, 3 Johns. Ch. Rep. 330.

The further remedy of the mortgagee is at law, and he may, pending a suit in chancery on the mortgage, sue on his bond, or covenant to recover the money:

An Executor of a Mortgagee will be restrained from enforcing Payment, and the Money will be ordered into Court, where there is no Heir of the Mortgagee who can re-convey (s).

If a Mortgagee be attainted of High Treason, a Bill, it seems, may be filed against the Attorney-General to redeem. In such case the King cannot be compelled to convey, but an *amoveas manum* only, lies (t).

Where a Bill of Foreclosure is brought against an Infant it is usual to decree a Foreclosure, with a *day to show cause [*532 when he becomes adult (u), (1) but the Court, in case the Mortgagees consent to a Sale, will direct an inquiry whether it will be for the Infant's benefit (x); (2) and when a day is given to show cause, the Infant when of age is not allowed to ravel into the Account, nor is he entitled to redeem the Mortgage by paying what is reported due, but can only show error in the Decree (y); (3) and where an Infant had a day to show cause, and

(s) *Schoele and Wife v. Sall*, 1 Sch. & Lefr. 177.

(t) See *Pawlet v. Attorney-General*, Hard. 465. The determination of the Court is not reported in Hardres, but from the remarks of Sir Thomas Clarke, Lord Mansfield, and Lord Keeper Henley, in *Burgess v. Wheate*, 1 Black. Rep. 145, it may be inferred, the Demurrer was overruled.

(u) *Goodier v. Ashton*, 18 Ves. 83. *Booth v. Rick*, 1 Vern. 295. *Spencer v. Boyes*, 4 Ves. 370, where the form of the Decree is given. Bishop

of *Winchester v. Beavoir*, 2 Bro. C. C. 317.

(x) *Mondrey v. Mondrey*, 1 Ven. & Bea. 83. — *v. Mansell*, 1807. MS.

(y) *Mallack v. Gahson*, 3 P. Wms. 352. In *Lyne v. Willis*, 2 Eq. C. Abr. p. 11, it is said to be the settled practice. S. C. 3 P. Wms. 352, in note. *Bishop of Winchester v. Beavoir*, 3 Ves. 317. *Spencer v. Boys*, 4 Ves. 370. *Williamson v. Gordon*, 10 Ves. 114.

and after a foreclosure and sale, in equity, he may sue at law to recover the deficiency. *Id.* *Jones v. Conde*, 6 Johns. Ch. Rep. 77. But chancery will restrain a mortgagee from proceeding at law to sell the equity of redemption, or put him to his election, either to proceed directly on his mortgage, or to seek other property (where the rights of creditors do not interfere,) or the person of the debtor, for the satisfaction of his debt. *Tice v. Annin*, 2 Johns. Ch. Rep. 125.

It is not a matter of course, on a bill for foreclosure and sale, to order the whole mortgaged premises to be sold. If the value of the property mortgaged exceed the debt, and can be separated, or if it consist of distinct parcels, some of which belong to the wife of the mortgagor, no more ought to be sold than is sufficient to satisfy the debt and costs. *Delabigarre v. Bush*, on appeal, 3 Johns. Rep. 490. *Vide Campbell v. Macomb*, 4 Johns. Ch. Rep. 534.

And where the interest on a bond is payable annually, and the principal at a future period; on a bill for a foreclosure and sale, for non-payment of interest, the whole or a part of the mortgaged premises may be sold, as the court may deem just or necessary; and an order, from time to time, as the interest or principal may become due, for a further sale, may be obtained, on the foot of the decree. *Brinkerhoff v. Thalhimer*, 2 Johns. Ch. Rep. 486. *Lyman v. Sale*, 2 Johns. Ch. Rep. 487. *Vide Campbell v. Macomb*, *ut supra*. But if the mortgaged premises are incapable of being sold in parcels, or of division, without injury, the whole may be sold, though the whole debt is not due; and the proceeds applied to pay the interest and costs, and the remainder to the principal. *Campbell v. Macomb*, *ut supra*.

(1) *Vide Mills v. Dennis*, 3 Johns. Ch. Rep. 367.

(2) *Vide Mills v. Dennis*, *ut supra*.

(3) *Vide Mills v. Dennis*, *ut supra*.

afterwards attained twenty-one, and left the kingdom to avoid his Creditors, permission was given to serve the Clerk in Court with the subpoena (z).

If a Mortgagee with a Power of Sale files a Bill to foreclose, he will not on *Motion* be directed to sell (a).

In respect to the manner in which the Account is to be taken as between the Mortgagor and Mortgagee, it appears to be a Rule, that wherever the gross Sum received exceeds the Interest it shall be applied to sink the Principal (b). (1) And where a Mortgagee enters into Possession of the Estate, and does by his own act render himself accountable for what he receives in discharge of his Principal and *Interest, *Annual Rents* will be [*538 directed (c); but they cannot be made by the Master, unless directed by the Decree (d). It has been held, however, that if a Mortgagee enters by Agreement into Possession of the mortgaged Lands, at a fair Rent, in discharge of the Debt, this forms an exception to the general Rule, and he will not be compelled to account for the full value of the Lands (e).

If the Mortgagor is permitted to remain in Possession he is not liable to account for the Rents and Profits to the Mortgagee (ee), not even if the Security becomes insufficient (f).

If a Mortgagee in Possession holds over after payment of his Principal and Interest, he will be charged with the Balance and Interest (g).

A Mortgagee in Possession is not obliged to lay out Money any further than to keep the Estate in necessary repair (h); (1) nor is he bound to leave the Premises in as good condition as he found them (i). And if a Mortgagee has expended Money in

(z) *Elcock v. Glegg*, 2 Dick. 764.

(a) Anon. 23 or 24 April 1818, before V. C. Leach.

(b) *Gould v. Tancred*, 2 Atk. 534.

(c) *Robinson v. Cumming*, 2 Atk. 410. And see *Gould and Tancred*, 2 Atk. 534.

(d) *Webber v. Hunt*, 1 Madd. Rep. 13.

(e) *Moroney v. O'Dea*, 1 Ball & Smith, 117; *sed. vld.* *Webb and Rorke*, 2 Sch. & Lefr. 661.

(ee) *Mead v. Lord Orrery*, 3 Atk. 244. *Ex parte Wilson*, 2 Ves. & Bea.

252. The Statement in *Moss v. Gallimore*, Dougl. 266, that a Mortgagor received Rents for the Mortgagee has been disapproved. See 2 Ves. & Bea. p. 252, 3.

(f) *Higgins v. York Buildings Company*, 2 Atk. 107. *Colman v. Duke of St. Albans*, 3 Ves. 25.

(g) *Quarrell v. Beckford*, 1 Madd. Rep. 266.

(h) *Godfrey v. Watson*, 3 Atk. 518.

(i) *Russell v. Smithies*, 1 Anstr. 96.

(1) *Wide Connecticut v. Jackson*, 1 Johns. Ch. Rep. 17. *Sloughton v. Lynch*, 2 Johns. Ch. Rep. 209.

(2) A mortgagee, or assignee, in possession, is not to be allowed for improvements in clearing and subduing wild land, but only for necessary repairs, &c.; and must account for the rents and profits, except such as have arisen exclusively from his own improvements, for which, he is not accountable. *Moore v. Cable*, 1 Johns. Ch. Rep. 385.

supporting the right of the Mortgagor to the Estate, where his Title has been impeached, the Mortgagee may add this to the Principal of his Debt; and it *will carry Interest (*k*) at [*534 the same rate as the Mortgage Debt (*l*).

If a Mortgagee of a Leasehold Interest pays renewal Fines he is entitled to be reimbursed out of the Estate (*m*).

If a Mortgagee in Possession is guilty of cross mismanagement of the mortgaged Estate he is answerable for it. but he is liable only for *wilful default*. If he speculates, it is at his own hazard (*n*). If he turns out, or refuses, a sufficient Tenant, he will be accountable (*o*).

A Mortgagee is not permitted to obtain any advantage out of the Mortgage Fund beyond the Principal and Interest (*p*).

A Mortgagee, therefore, is not allowed to make a charge as Receiver, if he himself has personally received the Rents (*q*); and this, though it be agreed he should be paid for his trouble in receiving the Rents (*r*), and though a Receiver might have been employed at the expense of the Mortgagor (*s*); but if he actually paid a Bailiff for Receiving the Rents, he will be allowed such payment (*t*).

If on a Mortgage in *Jamaica*, the Contract is to *pay [*535 the Mortgage-Money in *Jamaica*, the Mortgagee living in *London* is not entitled to claim the expense of remitting the Money to him; but if the Contract is to pay the Mortgage-money in *London*, the Mortgagee must pay the expense of remitting it there (*u*). The Rule is the same as to Irish Mortgages (*x*).

Interest upon Interest is not allowed in the case of a Mortgage (*y*), (1) more especially as against a subsequent encumbrancer (*z*), though such Interest is provided for in the Mortgage Deed (*a*). (2) There is nothing unfair, or, perhaps, ille-

(*k*) 3 Atk. 518.

(*l*) Woolley v. Drag, 2 Anstr. 531.

(*m*) Hamilton v. Denney, 1 Ball & Beatty, 202. Manlove v. Bale and Bruton, 2 Vern. 84.

(*n*) Hughes v. Williams, 13 Ves. 493.

(*o*) Anon. 1 Vern. 45.

(*p*) Gubbins v. Creed, 2 Sch. & Lefr. 218.

(*q*) Godfrey v. Watson, 3 Atk. 518. Bonithon v. Hockmere, 1 Vern. 316. Carew v. Johnston, 2 Sch. & Lefr. 301.

(*r*) French v. Baron, 2 Atk. 120.

(*s*) Langstaffe v. Fenwick, 10 Ves. 405; and see on this subject Gould v. Tancred, 2 Atk. 534.

(*t*) Godfrey v. Watson, 3 Atk. 518. Bonithon v. Hockmore, 1 Vern. 316. 2 Sch. & Lefr. 301. Davis v. Dendy, 3 Madd. Rep. 170.

(*u*) Cash v. Knyon, 11 Ves. 314.

(*x*) Sic dict. Ibid. p. 316.

(*y*) Ex parte Campion, 3 Bro. C. C. 440. Brown v. Barkham, 1 B. Wms. 651; see on this subject 2 Atk. 534. Thornbills v. Evans, 2 Atk. 331. contra Howard v. Harris, 1 Vern. 194.

(*z*) Patterson v. Schoemaker, at the Corkpit, 3 Feb. 1818. MS. Digby against Craggs, Ambl. 12. S. C. 2 Eden, 200.

(*a*) Ossulston v. Lord Yarmouth, 2 Salk. 449.

(1) Vide *Connecticut v. Jackson*, 1 Johns. Ch. Rep. 13. *Barrow v. Rhinelander*, 1 Johns. Ch. Rep. 550.

(2) Vide *Barrow v. Rhinelander*, 1 Johns. Ch. Rep. 550. *Van Benschooten v. Lawson*, 6 Johns. Ch. Rep. 313.

gal, in taking a Covenant originally, that if Interest is not paid at the end of a year it shall be converted into Principal; but the Court will not permit that, as tending to usury, though not usury (b). To render Interest on a Mortgage, Principal, it is requisite that the Interest should have become due; and there should be a writing signed by the Parties, (1) the Estate in the Land being to be charged (c); but when by a Decree on a Bill of Foreclosure a reference is made to a Master, to see what is due, and the Master reports what is due for Principal, Interest and Costs, Interest will, by a subsequent order, be allowed upon the whole amount of what is due, except, perhaps, in the case of an Infant (d).

*536] *If Money be lent in Town on Mortgage, the Mortgagor may give notice for payment of the same in Town, though the Mortgagee live at Oxford; but the Mortgagor must be ready to pay at the time, and from that time keep his Money ready, to prevent Interest running on (e).

Where a Mortgage carries five per Cent. Interest, and the Mortgagee, together with Bond creditors, file a Bill for a Sale of the Estate, only four per Cent. Interest will be allowed from the confirmation of the Report (f).

If a Mortgagee assigns, the Assignee, it has been held, is entitled to Interest on Interest then due (g).

If the Mortgage-money is tendered, the Mortgagor loses Interest from the time of the tender (h); but he must swear that the Money was kept, and that he made no profit of it (i).

An account settled before a Master, between a Mortgagor and the first Mortgagee, binds the second Mortgagee, unless fraud and collusion is shown (k). But a specific Devisee of a Mortgagee is not bound by an Account settled between the Representatives of the Mortgagor and those of the Mortgagee (l). The Costs of Suit in respect to Mortgages will be considered elsewhere (m).

*537] *The common Decree against a Mortgagee in Posses-

(b) Chambers v. Goodwin, 9 Ves. 271; and see Moseley, 247.

(c) Browne v. Barkham, 1 P. Wms. 650. See decree in Thorhill v. Evans, 2 Atk. 332, n. 1. and Orsulton v. Lord Yarmouth, 2 Salk. 449.

(d) See Bennet v. Edwards, 2 Vern. 292, and Mr. Raithby's note.

(e) Gyles v. Hall, 2 P. Wms. 378; and see Bishop v. Church, 2 Ves. 372.

(f) Harris v. Harris, 3 Atk. 722.

(g) 1 Chan. Cas. 258, noticed Grounds and Rudiments, &c. 363.

(h) Manning v. Burgess, 1 Chan. Cas. 29.

(i) Sutton v. Rod, 2 Chan. Cas. 206.

(k) Needler v. Deeble, 1 Ch. Ca. 239. S. C. 1 Eq. Cas. Abr. p. 12.

(l) Langley against Earl of Oxford, Ambli. 17.

(m) See post, tit. Costs.

(1) Vide *Van Benschooten v. Lawson*, *ut supra*. The agreement, to be valid, must be prospective, in its operation, as that the interest due at the time, shall carry interest afterwards. *Ib.*

sion is for an account "of what he has received, or what he might have received without his own wilful default" (n).

3. In respect to *Equitable Mortgages* it has been decided, notwithstanding the *Statute of Frauds*, (29 Car. 2. c. 3 s. 4,) that a mere deposit of Title Deeds, upon an advance of Money, without a word passing, gives an equitable Lien (o) even against a subsequent Purchaser without notice (p); and such Deposit will cover subsequent advances, if it appear by clear Evidence that they were made upon the faith of that security (q). But it seems not to have been decided how far it is necessary to deliver all the Title Deeds; or whether that would not be taken to be a sufficient deposit which could be taken, upon looking at the Instruments, to amount to Evidence that the Estate was meant to be a Security (r); but it has been held, that the delivery of Deeds for the purpose of having a Mortgage drawn, will not amount to an equitable Mortgage (s).

The meaning and object of a Deposit may, it seems, be explained by parol Evidence; a circumstance which *has [*538 often been lamented (x); and Deposits are not favoured (y), especially when contradicting a written Instrument (z). It were well, perhaps, if no such Mortgages were permitted (a); they seem contrary to the spirit and the letter of the Statute of Frauds, which requires all Trusts, except implied Trusts, to be in Writing. If there are false and contradictory accounts as to what was the nature of the Deposit, it will be held to be no Lien (b).

If the Deposit is in the hands of a third person, it may be considered as a Deposit for the Creditor, provided such is proved to be the Intention (c). It is very delicate when the Deposit remains in the hands of the Mortgagor himself; and it seems questionable, whether a mere memorandum, kept in his own possession, and not parted with to the Man in whose favour it is expressed, or if Deeds were put into the hands of the Wife of the Mortgagor (d), it would take the case out of the Statute.

(n) *Macnamara v. Bailey*, MS. Prec. Chan. 116. 2 Fonb. Tr. Eq. p. 432, in note; contra 1 Chan. Cas. 268.

(o) See *Ex parte Langston*, 17 Ves. 227. *Russell v. Russell*, 1 Bro. C. C. 269, was the first case establishing these Equitable Mortgages; a decision, frequently lamented. See *Edge v. Worthington*, 1 Cox, 212.

(p) *Hiern v. Mill*, 13 Ves. 114; but see *Birch v. Ellames*, 2 Anstr. 431. *Plumb v. Fluit*, 2 Anstr. 432.

(q) *Ex parte Langston*, 17 Ves. 227. 1 Rose, 26; and see what is said in *ex parte Hooper*, 1 Meriv. 9. *Ex parte Whitbread*, 19 Ves. 209, S. C. 1 Rose, 299.

(r) *Ex parte Wetherell*, 11 Ves. 401.

(s) *Norris v. Wilkinson*, 12 Ves. 192.

(x) *Ex parte Haigh*, 9 Ves. 403; and see particularly *Norris v. Wilkinson*, 12 Ves. 199.

(y) See 1 Meriv. p. 9.

(z) *Ex parte Combe*, 17 Ves. 360.

(a) See 11 Ves. 403. S. C. MS. 12 Ves. 196. 14 Ves. 606. 1 Meriv. 9. *Ex parte Warner*, 19 Ves. 203.

(b) Anon. MS.

(c) See *ex parte Whitbread*, 19 Ves. 212.

(d) Vid. *Ex parte Coming*, 9 Ves. 117.

The Deposit of a mere Agreement gives an equitable Lien (e); and so does the Deposit of the Copy of a Court-Roll (f).

An Assignment of *Rents and Profits*, or of *Deeds*, gives an equitable Lien, and entitles the Party to insist upon a Mortgage (g).

*539] *An equitable Mortgage by Deposit of Title Deeds by an Accountant of the Crown, in the hands of one who had an opportunity of knowing that the Depositor is, or may become, a Debtor to the Crown, is not available against an Extent; and it has been doubted whether a Deposit by the King's Debtor is good, in any case, against the Crown (h); but it seems it is.

Sir Lloyd Kenyon, when Master of the Rolls, was of opinion that a mere Agreement to assign without a Deposit of Deeds would amount to an equitable Mortgage (i); but it has been held that a promise in writing to give a security, by Mortgage of Lands when required, is upon the Party's death no Lien on his Real Estate (k).

An equitable Mortgage will be made good as against Assignees (l).

In a case, where an Assignee bought the Bankrupt's Estate, and out of the Consideration-Money paid an Equitable Mortgage, and took the Deeds, which Sale was afterwards set aside on the known principles of the Court (m), it was held that the Equitable Mortgagee did not lose his Lien (n).

Where a Lease was deposited to secure a Debt, the Depository was, on a Bill filed by the Lessor, *decreed to perform the Covenants, and take an Assignment, paying the Costs of it; and it was held he could not abandon it; for being entitled to a legal Conveyance, he is considered as having it (o); not, however, to all intents and purposes; for where there was a Covenant not to assign a Lease without the license of the Landlord, and the Lease was deposited as a Security for the Debt, Lord Eldon held the Deposit was not a Forfeiture, but that he could not order the Estate to be sold without the consent of the Landlord (p).

(e) In *Arg o. ex parte Warner*, 19 Ves. 403.

(f) *Ibid.* 202.

(g) *Ex parte Willis*, 1 Ves. jun. 162.

(h) *Broughton and another v. Davis and Attorney-General*, Price, 1 Vol. p. 216. According to my MS. note of a case in the Exchequer in 1804, *Rex v. Benson*, it was held that a Deposit of Deeds as a Security prior to the Fiat of an Extent, is good against the Crown; and the Court held, that if one under Marriage Articles agrees to settle a par-

ticular Estate, the Crown could not take the Estate.

(i) *Hankey v. Vernon*, 2 Cox, p. 14.

(k) *Williams v. Lucas*, 2 Cox, 160.

(l) *Jones v. Gibbons*, 9 Ves. 411; *Pye v. Daubuz*, 2 Dick. 759.

(m) See ante, p. 110, &c.

(n) *Ex parte Morgan*, 12 Ves. 6.

(o) *Lucas v. Commerford*, 1 Ves. jun. 235. S. C. 3 Bro. C. C. 166.

(p) *Ex parte Abdy*, 13 Apr. 1813; mentioned 2 *Christian's Bankrupt Law*, p. 335.

Before we conclude the subject of Mortgages it may be proper to consider the doctrine of *Merger* so far as regards them.

On this subject the general Rule appears to be, that a Person becoming entitled to an Estate liable to a Charge (a Mortgage, for instance,) for his own benefit, may, if he chooses, at once take the Estate and keep up the Charge. Upon this subject a Court of Equity is not guided by the Rules of Law: It will sometimes hold a Charge extinguished where it would subsist at Law; and sometimes preserve it, where at Law it would be merged. The question is upon the intention, actual or presumed, of the Person in whom the Interests are united. In most instances it is, with reference to the party himself, of no sort of use to have a Charge upon his own Estate, and where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot (q). (1) The Entry of a Devisee, having a Mortgage, *will be presumed to be as Devisee, if no trace appears of any of the steps usually taken by a Mortgagee to get into Possession (r).

TRUSTS, created by Deeds, for the payment of Debts, or of Compositions for Debts, are frequent, and Courts of Equity will assist in the enforcement of Agreements for a Composition, if

(q) *Forbes v. Moffat*, 18 Ves. 303, 1. (r) *Ibid.* 391.

(1) Where the owner of an equity of redemption pays off a subsisting mortgage, and takes an assignment of it, it will be presumed, that his object is to exonerate the estate, and that the mortgage is extinguished, unless it can be made to appear, that some beneficial interest would result from keeping the legal and equitable estates distinct. *Gardner v. Aster*, 3 Johns. Ch. Rep. 53. *Starr v. Ellis*, 6 Johns. Ch. Rep. 393. *James v. Johnson*, 6 Johns. Ch. Rep. 417.

It is a general rule, both at law, and in equity, that where the legal and equitable estates are united in the same person, the latter is merged in the former; but in equity, there are exceptions to the rule, in certain special cases: As where the intention of the party is distinctly declared at the time; or where something just and beneficial requires the charge to be preserved, in a case in which the party has not declared, or cannot declare his intention; and where an infant is entitled to an estate, and, also, to a charge upon it, the rights will be kept distinct, if the interest of the infant should seem to require it. *James v. Johnson*. *Starr v. Ellis*, *ut supra*. And chancery will allow an encumbrance to be kept on foot, or consider it extinguished, as may best serve the purposes of justice, and the reasonable intent of the parties. *Ib.*

So, where a mortgagor conveys the equity of redemption to the mortgagee, by an absolute deed, with full covenants, the equitable will be merged in the legal estate. *Burnett v. Denniston*, 5 Johns. Ch. Rep. 35. *Mills v. Comstock*, 5 Johns. Ch. Rep. 214.

Though a mortgagee may, by way of extinguishment, release his interest to the mortgagor, yet he cannot convey it as a subsisting interest, absolutely, or by way of mortgage to a third person, especially, before foreclosure, or possession taken under the mortgage, because that would separate the debt from the pledge, which cannot be done. *Amyer v. Bill*, 5 Johns. Ch. Rep. 570.

obtained without fraud, or misrepresentation (*s*). (1) Underhand Agreements upon these occasions, have already been observed upon under the head of Fraud.

When a Man conveys Land for the payment of his Debts, and keeps possession of the Conveyance, it is considered as fraudulent (*t*).

An Assignment of all a Trader's Property, though for the benefit of all his Creditors, is an *Act of Bankruptcy*, the reason being, that a Trader has not a right by deed to place his Property under a distribution different from that ordained by the Bankrupt Law (*u*). (2) And though there be a provision in the Assignment of the whole, or nearly the whole, of a Trader's Estate and Effects, that the Deed is to be void if a Commission of Bankruptcy shall be taken out, or if all the Creditors whose Debts amount to 20*l*. do not sign within a given time, yet still such an Assignment, notwithstanding such condition, amounts *542] to an Act of Bankruptcy (*x*). *Indeed, the inconveniences arising out of Trust-Deeds by Traders, are such, that they are seldom or ever advisable (*y*).

(*s*) Pollend v. Husband, 1 P. Wms. 427. Cann v. Caun, 1 P. Wms. 722. and see Dutton v. Morrison, 17 Ves. 197. sed vid. Pickstock v. Lyster, 3 Maul. & Selw. 371.

(*t*) Tarbuck v. Marbury, 2 Vern. 510. (*x*) Dutton v. Morrison, 17 Ves. 197, 8.

(*u*) Ex parte Bourne, 26 Ves. 148. Cook's Bankrupt Law, 5th edit. p. 39; (*y*) See on this subject 2 Christian's Bankrupt Law, 151.

(1) Collateral securities to creditors, are considered in equity, as trusts, and the court will enforce their execution. *Moses v. Murgatroyd*, 1 Johns. Ch. Rep. 119.

(2) Where no law relating to bankruptcy exists, an assignment of personal property, by an insolvent debtor, who has stopped payment, to secure a particular creditor for existing claims and engagements, and also for future advances and responsibilities, if made *bona fide*, and without unfairness or dishonesty, will be deemed valid. *Hendricks v. Robinson*, 2 Johns. Ch. Rep. 283. Vide *Riggs v. Murray*, 2 Johns. Ch. Rep. 577.

So, an insolvent debtor may, *bona fide*, assign his property, if it be not subject to any lien, in trust, for the benefit of all his creditors; and the assent of the creditors is not essential to the validity of the deed. But if the assignment be made directly to the creditors, without the intervention of trustees, their assent will be necessary. *Nicoll v. Mumford*, 4 Johns. Ch. Rep. 522.

And so, where a debtor conveys all his estate real and personal, in trust, for the benefit of all his creditors, the trustee is considered as a *bona fide* purchaser. *Dey v. Dunham*, 2 Johns. Ch. Rep. 182.

An assignment of property to trustees, in trust, for the payment of debts, with a power of revocation, and of the appointment of new trusts, &c., though it may be avoided by a person who had previously acquired a title under the assignor, is capable of confirmation by a subsequent irrevocable deed; provided, in the mean time, the rights of creditors have not intervened. *Murray v. Riggs*, on appeal, 15 Johns. Ch. Rep. 571. Contra, *S. C.* 2 Johns. Ch. Rep. 565.

Where an assignment of property is made, in trust, for the benefit of the trustee, and a third person, no agreement between the assignor and the trustee can deprive such third person of the full benefit of the assignment. *Messonnier v. Kauman*, 3 Johns. Ch. Rep. 3.

It was the repeated doctrine of *Lord Mansfield* (z), that every act done with a view to defeat the Bankrupt Laws, by giving a preference to Creditors, is fraudulent and void, and if *by Deed* is an Act of Bankruptcy (a); but a Trader, it seems, may show a preference to particular Creditors, provided it is not done under the apprehension of Bankruptcy, and the property so conveyed does not exhaust the whole estate, or what remains is not colourably left (b).

The Surrender of a Copyhold Estate in favour of a particular Creditor, is not an Act of Bankruptcy under the 1 Jac. 1. c. 15. s. 2, because it does not defeat or delay Creditors, the Copyhold being neither liable to a *fiery facias*, or to an *elegit* (c).

A. brought an Action against B. for Adultery with his Wife, and thereupon B. assigned his Estate to Trustees, in Trust to pay Debts mentioned in a Schedule, and such other Debts as he should name within ten days; and afterwards A. recovered 5000*l.* damages, and filed a Bill to set aside the Deed, but it was held not to be fraudulent; A. being no Creditor, *on the execution of the Deed, and his Debt recovered after, being founded in *maleficio* (d).

If a Man, in his Life, creates a Trust for payment of Debts, and annexes a Schedule of some Debts, and creates a Trust-Term for the Payment, as that is in the nature of a Specialty, it will make these, though simple-contract Debts, carry Interest (e).

A Bill by such Creditors as had signed a Deed of Composition arising from a Trust-Estate, conveyed for the purpose of paying Debts in general, other Creditors refusing to come in to have the Trusts of the Deed carried into execution, has been dismissed (f); but it seems a Bill may be exhibited by those Creditors who come in under the Trust-Deed, against those who stand out, to come in, or renounce the benefit of the Trust (g).

If Creditors are to execute a Deed of Assignment by a time stated therein, and it is provided by the Deed, that in case they do not do so the Deed shall be null and void; in case they do not execute the Deed within that time the Deed is void at Law;

(z) *Worsley v. De Mattos*, 1 Burr. 467. *Hague v. Rolliston*, 4 Burr. 2174. *Alderson v. Temple*, 4 Burr. 2235. *Harman v. Fisher*, Cowp. 117. *Rust v. Cooper*, Cowp. 629. *Hassell v. Simpson*, Dougl. 89. 8. C. 1 Bro. C. C. 99. *Devon v. Walls*, Dougl. 86. *Butcher v. Easts*, Dougl. 294.

(a) See 2 Christian's Bankrupt Law, p. 128, and the distinctions there taken.

(b) *Jacob v. Shepherd*, 1 Burr. 478. *Unwin v. Oliver*, mentioned in 1 Burr. 481.

(c) *Ex parte Cockshott*, 3 Bro. C. C. 502; but see the observations on this decision 2 Christian's Bankrupt Law, p. 112.

(d) *Lewkner v. Freeman*, Prec. Ch. 105.

(e) *Barwell v. Parker*, 2 Ves. 363; and see *Countess of Kildare v. Hobson*, 4 Bro. P. C. 164.

(f) *Atherton v. Worth*, 1 Dick. 375.

(g) *Dunch v. Kent*, 1 Vern. 260; but see *Atherton v. Worth*, 1 Dick. 375.

but it is the constant course in Equity, that if Creditors act under such a Deed, and thereby treat it as valid, although they have not executed it, that a Court of Equity will also act under it, and treat it as valid, whether such Creditors have signed it or not *h*).

*544] *It seems doubtful, whether under a Trust "to raise Money by Sale or Sales, Mortgage or Mortgages," and Money is raised by Mortgage, the Trustees have power to sell the Estate to pay off the same *i*).

Where a Deed of Trust is made for payment of Debts, it extends only to Debts contracted at the time of making the Deed *k*). It has also been held that a Provision for Debts carrying Interest does not include what may be owing in respect of Property in an Executor's hands, which he may be liable to repay with Interest *l*). When a Man settles his Lands for payment of his Debts generally, all his Creditors are equally concerned and entitled, and none is to be preferred before another, and in this case Debts without Specialty are to be in the same condition, and equally regarded as Debts by Specialty; (1) for though there be a difference in case of Executors who are to pay Specialties before Promises, that is an artificial preference by Law, but naturally a Debt by Contract without Specialty is as just as the other. And the Conveyance to Trustees, being them-

(b) *Spottiswoode v. Stockdale*, Coop. 23. S. C. 1 Vern. 28; but see 105, 6. *Ex parte Shaw*, 1 Madd. Rep. 598. *Lewkner v. Freeman*, Prec. Ch. 105.

(f) *Falk v. Lord Clinton*, 12 Ves. 48. (l) *V. C. Leach in Willock v. —*, 26 June 1818.

(k) *Puresoy v. Puresey*, 2 Dick.

(1) Vide *Codwise v. Gelston*, on appeal, 10 Johns. Rep. 507. *M'Dermutt v. Strong*, 4 Johns. Ch. Rep. 697. *Thompson v. Brown*, 4 Johns. Ch. Rep. 619. *Riggs v. Murray*, 2 Johns. Ch. Rep. 577. But where the law gives a priority, equity will not destroy it; and especially, where legal assets are created by statute, as in case of judgments, they remain such, and will be protected, though the creditor is obliged to resort to chancery for relief. *Codwise v. Gelston*, *ut supra*.

So, where a judgment creditor, who takes out execution at law, and is unable to reach a residuary trust interest in the chattels of his debtor, and files the bill in chancery for relief, he thereby gains a legal preference, which will be recognised in equity, and which cannot be impaired by any subsequent assignment of such interest, by the debtor. *M'Dermutt v. Strong*, *ut supra*.

So, a decree in chancery is equivalent to a judgment at law, and if prior in time, is first to be paid. *Thompson v. Brown*, *ut supra*.

And, generally, a debtor may give preference to particular creditors, when no legal lien intervenes, and when the transaction is fair and honest. *M'Menomy v. Murray*, 3 Johns. Ch. Rep. 435. *M'Menomy v. Roosvelt*, 3 Johns. Ch. Rep. 446. *Williams v. Brown*, 4 Johns. Ch. Rep. 682. *Murray v. Riggs*, on appeal, 15 Johns. Rep. 571.

For the purpose of an equal distribution of assets, chancery will enjoin creditors from proceeding at law. *Thompson v. Brown*, *ut supra*. *Benson v. Le Roy*, 4 Johns. Ch. Rep. 651. But creditors will not be restrained from proceeding at law, merely on a bill being filed in chancery, against an executor or administrator; judgment at law, obtained before a decree, will be protected in its priority. *Benson v. Brown*, *ut supra*.

selves Creditors and Sureties, for a guard, doth not give them any preference before others (m).

Where Estates are conveyed or devised to Trustees, upon Trust to sell, and to apply the Purchase money for any particular or specific purpose, a Purchaser of the Estate, with notice of the Trust, is bound to see to the application of the Purchase-Money; (1) *for if the purposes to which it is directed are [*545 not fulfilled by the Trustees, the Estate will still be liable to them, in the hands of the Purchaser (n). This subject has already been adverted to (o). It is usual in Deeds or Wills by which Trustees are empowered to sell Lands, to insert a clause, declaring their receipts of the Purchase-moneys shall be a sufficient discharge to the Purchasers. This clause relieves a Purchaser from the necessity of seeing to the application of the Purchase-money.

4. By the Common Law, a *Chose in Action* cannot be assigned, or granted over (p), except in the case of the King, who may either grant or receive the same, by Assignment (q); but in Equity a *Chose in Action* may, for a consideration (r), be assigned (s), even by *parol* (t), and is good against Creditors under a Bankruptcy (u); and in an Assignment by Deed no particular words are necessary (x), though it usually contains an Agreement to permit the Assignee to make use of the name of the Assignor to recover the Property, and is considered in the nature of a Declaration of Trust (y). (2)

(m) Anon. 2 Ch. Cas. 54.

(n) 1 Cruise's Dig. 527.

(o) Ante, p. 443.

(p) Lampet's Case, 10 Co. 48a.

(q) See 2 Ves. 181. Dy. 306.

(r) In Lord Carteret v. Paschall, 3 P. Wms. 199, it was held it might be assigned without consideration; but see 2 Vern. 595. 3 Chan. Rep. 90. Anon. 2 Freem. 145. Robinson v. Bavasor, Vin. Abr. tit. Assignment, (D) Ca. 29 A Husband, certainly, cannot assign a Chose in Action in right of his Wife,

without a consideration. [3 P. Wms. 199.]

(s) Squib v. Wynn, 1 P. Wms. 381, Wright v. Wright, 1 Ves. 411. Row v. Dawson, 1 Ves. 229, 333, overruling Thomas and Freeman, 2 Vern. 563.

(t) Heath v. Hall, 4 Taunt. 328.

(u) Browne v. Heathcote, 1 Atk. 160.

(x) 1 Ves. 332.

(y) Butl. Co. Lit. 232b. n. 1. 3 P. Wms. 199.

(1) Vide *Lining v. Peyton*, 2 Des. 375, 378.

(2) Courts of law will take notice of, and protect the rights of an assignee of a chose in action, against all persons having either implied or express notice of the trust or assignment. *Welch v. Mandeville*, 1 Wheat. 235. *Mandeville v. Welch*, 5 Wheat. 277, 283. *Raymond v. Squire*, 11 Johns. Rep. 47. *Andrews v. Beecher*, 1 Johns. Cas. 411. *Briggs v. Dorr*, 19 Johns. Rep. 95. *Anderson v. Van Alen*, 12 Johns. Rep. 343. *Littlefield v. Storey*, 3 Johns. Rep. 421. *Wardel v. Eden*, 2 Johns. Cas. 121.

A special notice of the trust or assignment need not be shown; it is sufficient, if the party has such knowledge of the facts and circumstances, as will put him on inquiry. *Anderson v. Van Alen*, *ut supra*.

So, the assignor of a chose in action cannot defeat an action brought in his name by the assignee, by a release to the defendant, after notice. *Andrews v. Beecher*, *Raymond v. Squire*, *Mandeville v. Welch*, *ut supra*. Nor by a collusive agreement with the defendant, to dismiss the suit. *Welch v. Mandeville*, *ut supra*.

***546]** A *Bond* (z), the benefit of a *Decree* or *Judgment* (u), *Policies of Insurance* (x) *Debts* (y), or other *Choses in Action*, may thus be assigned.

By the Law of *Ireland*, Judgments may be assigned even at Law, and the Assignee may take all the remedies in his own name (z).

A *Chose in Action* once assigned cannot in general be afterwards assigned, though the Assignment be without notice (a). If, however, the Purchaser of a *Chose in Action* gives no notice to the Trustee of his Purchase, and such equitable Right is afterward assigned to a second Purchaser, who gives notice of his Assignment, he it has been thought, would be preferred (b).

The reason of the Common Law for not allowing such Assignments has been considered as refined (c); but there seems to have been wisdom in it, (as there is in almost all the provisions of the Common Law, since it tended to champerty and maintenance, and to pass Debts into the hands of the more powerful, who were thus enabled to oppress the inferior orders. Courts of Equity, however, considering that in a commercial country much property must lie in contract, will protect the assignment of a *Chose in Action*, as much as the Courts of Law will that of a *Chose in Possession* (d).

***547]** *An Assignee of a *Chose in Action*, as he is entitled to all the remedies of the Seller (f), so he takes it subject to the same Equity as it was liable to in the Assignor's hands (g), (1) except in the case of the Assignment of Bills of Exchange, or Notes before they are due, which may be enforced by an Assignee for a valuable consideration, though no consideration was given

(z) 3 P. Wms. 200.

(u) 3 P. Wms. 199.

(x) *Sadler's Company v. Badcock*, 1 Sergt. Wilson's Rep. 82.

(y) *Ex parte Alderson*, 1 Madd. Rep. 53.

(z) *O'Fallon v. Dillon*, 2 Sch. & Lefr. 22.

(a) *Tourville v. Naish*, 3 P. Wms. 307. *Brace v. Duchess of Marlborough*, 3 P. Wms. 496.

(b) *Sugden's Vend. & Purch.* 600,

4th edit. who cites *Stanhope v. Earl Verney*, Bull. note (1.) to Co. Lit. 2905. 1 Ves. 367. 9 Ves. 410.

(c) *Thomas v. Freeman*, 2 Vern. 563.

(d) 4 Cruise's Dig. 121.

(f) *Ex parte Lloyd*, 17 Ves. 245.

(g) *Coles v. Jones*, 2 Vern. 692. *Turton and Benson*, 2 Vern. 764. *Hill and Caillovel*, 1 Ves. 122. *Davies v. Austen*, 1 Ves. jun. 247.

(1) Vide *Murray v. Lylburn*, 9 Johns. Ch. Rep. 441. *Allen v. Randolph*, 6 Johns. Ch. Rep. 693. *Russell v. Clark's Exrs.* 7 Cranch, 69, 97.

But the assignee of a chose in action is not subject to any latent equity residing in a third person, against the assignor. *Murray v. Lylburn*, *ut supra*. *Livingston v. Dean*, 2 Johns. Ch. Rep. 479.

In order to subject the assignee, to such an equity, he must have either express or constructive notice of it, at the time of the assignment. *Livingston v. Dean*, *ut supra*.

by the Person who assigned to him; an exception made in favour of Trade (*h*).

Where there is an Assignment of a Mortgage, in general cases, the Assignee takes it entirely at his risk as to what is due between the Mortgagor and Mortgagee, upon taking the account from beginning to end, unless the former joins in the Assignment (*i*) (*l*).

If after an Assignment of a Mortgage, payments are made to the Mortgagee, without notice of the Assignment, the Assignee must allow such payments; and this, though the Assignment of the Mortgage be registered, for the registry is not notice for that purpose (*k*).

A statement in an Assignment of a Mortgage, that so much is due for Principal, and so much for Interest, concludes a Mortgagee, though not the Mortgagor, unless he is a Party to the Assignment (*l*). It is ill advised, therefore, to take an Assignment of a Mortgage without making the Mortgagor a Party, and *being satisfied as to the sum really due (*m*). As be- [*548
tween the Mortgagee and the Persons claiming under him, *without the privity of the Mortgagor*, they cannot add to what is due, settle the account, or turn the Interest into Principal (*n*).

If a Mortgagor permits an Assignee to pay the Assignor a sum of Money, which he, with the knowledge of the Mortgagor, represents to be due, he will himself be bound by the transaction (*o*).

If a Legacy be assigned, the executor when called upon, cannot set off a debt due to himself from the Legatee (*p*).

Where there has been an Assignment of a Debt, the Debtor, having notice of the Assignment, is, in Equity, considered as bound to pay the Money to the Assignee, and not to the original Creditor (*q*); but the Debtor in the absence of notice, may pay the original Creditor (*r*).

When a Debt is assigned, it is necessary, in order to prevent the effect of the Statute, 21 (Jac. I. c. 19, sec. 10 and 11,) where the Assignor afterwards becomes Bankrupt, that the Se-

(*h*) Anon. Com. Rep. 49. S. C. 2 Eq. Abr. 85.

(*i*) Chambers v. Goldwin, 9 Ves. 264, 268.

(*k*) Williams v. Sorrell, 4 Ves. 389.

(*l*) Carew v. Johnstone, 2 Sch. & Lefr. 296.

(*m*) Matthews v. Wallwyn, 4 Ves. 127.

(*n*) Ibid. 128; and see Askenburt v. James, 3 Atk. 271; but see contra the decree in Earl of Macclesfield v.

Fitton, 1 Vern. 169, in note 1, and Gladwin v. Hitchman, 2 Vern. 135.

(*o*) Chambers v. Goldwin, 9 Ves. 270.

(*p*) Whitaker v. Rush, Ambl. 407.

(*q*) Row v. Dawson, 1 Vez. 322. Ryall v. Rowles, 1 Vez. 344. 362. 367. Langley v. Lord Oxford, Ambl. 17. Fenner v. Mears, 2 Black. Rep. 1269. Israel v. Douglas, 1 H. Black. 239; but see the observations on Fenner v. Mears, in 15 East, 557, n. (*a*.)

(*r*) Jones v. Gibbons, 9 Ves. 410.

(1) Vide Livingston v. Dean, 2 Johns. Ch. Rep. 479. Skirras v. Caig, 7 Cranch, 34, 48.

curity, if any, should be delivered to the Assignee, and notice given to the Debtor (s).

*549] *All *possibilities or contingent Interests*, whether of Real or Personal Estate, though not grantable at Law, are, it seems, in general, assignable in Equity (u), as well as transmissible, and devisable (x). But an Assignment of the *half-pay* of an officer has, upon grounds of public policy, been held to be bad (y); though previous to the Statute (z) the pay of a *seaman* might be assigned (a).

At Law, the sale by an Heir of his *hope of succession* is void (b); though in Equity there are cases where it has been established (c), but Lord Eldon has expressed a serious doubt upon this point (d); and it was the doctrine of the Civil Law, *Nullius posse filii familias bonum nomen expectata patris morte fieri* (e). If an estate descends to a Bankrupt after he has obtained his Certificate, it has been held not to pass by the Commissioners Assignment, and the Bankrupt takes it (f); but if it were assignable in Equity it seems it would pass. This decision, therefore, appears to fortify the doubt of Lord Eldon; which seems founded on principles of public policy (g). Such Assignment, by the Scotch Law is, however, good (h).

*550] Not only a Trust in esse, but the possibility of a *Trust may be assigned in Equity (g). Assignments by a Husband of *Choses in Action* belonging to his Wife have before been adverted to (h).

We proceed now to the consideration of,

II. Express Trusts created by Will.

THE doctrine as to Devises and Bequests, taken in its full extent, and comprehending Devises and Bequests of Legal, as well as of Trust Estates, would unavoidably be very voluminous; but it is only the consideration of *Devises and Bequests in Trust*, which, consistently with the plan of this work, is here necessary to be considered; for they alone peculiarly belong to equitable cognizance. Nor is it all Devises of Land in trust that will here be noticed, but only such, where the construction of the words

(s) Jones v. Gibbons, 9 Ves. 410.

(u) Warmistery v. Tanfield, 1 Ch. Rep. 29; and see 1 Ch. Ca. 8.

(x) Fearn on Executory Devises, p. 548, &c. last edit.

(y) Stone v. Lidderdale, 2 Anstr. 539; and see 3 Term Rep. 243.

(z) 1 Geo. 2. st. 2. c. 14.

(a) Crouch v. Martin, 2 Vern. 595.

(b) Touchst. 239. Perk. 68. Jones v. Roe, 3 T. R. 88.

(c) Hobson v. Trevor, 2 P. Wms. 191. Beckley v. Newland, 2 P. Wms. 181.

Vide what is said in Lord Dursley v. Fitzhardinge, 6 Ves. 261.

(d) In Harwood v. Tooke, MS. April 1804, and see Carleton v. Leighton, 3 Meriv. 667.

(e) Dig. l. xiv. tit. 6, cap. 1, in præfat.

(f) See post.

(g) See on this subject 1 Fonbl. 215.

(h) 1 Vol. Dict. Decisions, p. 333.

(g) Warmistery v. Tanfield, 1 Ch. Rep.

(h) Ante, 478.

of a will is different in Equity, from the construction which the same words would receive in a court of Law ; for in those cases where the construction of a Court of Equity upon words is the same as in a Court of Law, Equity professes to follow the Law, and the Common Law decisions must be resorted to as the most conclusive authorities. In all those cases where there is an express *Devise in Trust*, or where the Estate is in the hands of Trustees, a Court of Equity is exclusively entitled to decide. Courts of Law will not take cognizance of a *Trust* ; and so strictly do they adhere to this rule, that if a Case be sent to them from the Court of Chancery for their opinion, they will refuse to give it, if the Case states a *Trust* (i).

*The Common Law Courts in such cases have no juris-[*551 diction ; and on the other hand, generally speaking, the Chancellor has nothing to do with Legal Estates, but his right of deciding as to them often arises *collaterally*, if, for instance, an Estate is agreed to be sold, and a Bill is filed by the vendor to enforce a *specific performance* of the Agreement, in such case the vendee may answer, I am ready to perform my Agreement if you the Plaintiff can make a good Title." Upon this as before observed, it is referred to the Master, to consider if a good Title can be made ; and upon exceptions to his Report, the Chancellor may be called upon to determine as to the legal Title to the Estate. In these, and in a variety of other cases, that might be put, the Chancellor is often called upon to decide on the *legal Title* to an Estate, though the Courts of Common Law never can, in any way, be called upon to determine on an *equitable title* to an Estate. But though in these instances the chancellor may be called upon to decide a strictly legal question, yet if he has any doubt upon the subject (unless the parties wish to have a Judgment without directing a case,) he usually directs a Case to one of the Law Courts (k) ; thus acknowledging those Courts to be, as they certainly are, the proper *forum* for the decision of such questions. We shall not therefore, (in conformity with the plan of this work (l), which is exclusively confined to Chancery doctrine,) notice any of those Decisions which have been made upon *legal Titles* ; and shall only premise, that there is no difference between Law and *Equity in determining upon the [*552 effect of a testamentary act (m), and that the Devise of a Trust must have the same construction as that of a legal Estate (n) ; a court of Equity having (with some few exceptions) no greater latitude in the construction of Wills than a court of Law (o).

Whether an Estate in Fee, in Tail, or for Life, or otherwise,

(i) See 5 Ves. 578.

(k) See Attorney-Gen. and Vigor, 8 Ves. 272.

(l) See Preface.

(m) Habbergham v. Vincent, 2 Ves.

jun. 235, 6.

(n) Atkinson v. Hutchinson, 3 P. Wms. 259.

(o) See Duke of Marlborough v. Lord Godolphin, 2 Ves. 74.

passes, the quantity of the Estate, is decided by the same Rules as in Courts of Law, whether the Devise be of a Legal or a Trust Estate, except in the case of *Executory Trusts*, there being a difference between what are termed, "*Trusts executed*," and "*Executory Trusts*."

In the case of a *Trust executed* there ought to be no difference of construction in a Court of Equity, from what there is in a Court of Law, upon a legal limitation (p). It was, indeed, the observation of *Lord Jefferies*, that the construction of Trusts must be governed by the intention (q); but with the exceptions adverted to, no rule is so strictly adhered to in Equity, and considered so dangerous to depart from, as that the construction of Trusts must be the same as of legal Estates (r). It is not so to all collateral purposes, since a Tenant for Life of an equitable Estate cannot destroy contingent Remainders (s).

*553] The consideration of *Executory Trusts* is exclusively *under the cognizance of a Court of Equity, and there is a series of Decisions on that subject peculiar to those Courts.

"This," says *Lord Hardwicke*, in a case before him upon a Devise, "is a mere question of Law, and is already put in a proper course (a Case having been directed;) and unless there was something *executory* in it, I ought not to meddle with it in Equity, except there were some Case already in point determined" (t).

So in regard to *Bequests* of personal Estate, determinations upon them, in most cases, belong, in preference of Courts of Law, to the consideration of Equity; for Executors or Administrators, are considered merely as *Trustees* in a Court of Equity, and all Persons to whom Bequests are made are considered as *Cestuis que Trust*, and as such, entitled to have their rights ascertained and protected by a Court of Equity; and to those Courts recourse is usually had to obtain the benefit of a Bequest of personal Property.

We shall, therefore, after a few words upon the general Rules for the construction of *Wills*, proceed to consider *Executory Trusts* and *personal Bequests*.

In regard to Decisions upon *Wills*, there is only one general Rule of Construction, equally for Courts of Equity and Courts of Law; which the Courts are bound to apply, however they may condemn the object. The Intention must be followed where it is plain; even though contrary to the legal operation of words in the Will (u); (1) for in a Will no particular words are required

(p) *Wright v. Pearson*, Ambl. 362.

(q) *Norton v. Mascall*, 2 Vern. 24.

(r) *Wright against Englefield*, Ambl. 473. *Lord Falkland v. Bertie*, 2 Vern. 342.

(s) In *Chapman v. Blisset*, MS. Lord

Talbot held, clearly, the Remainder could not be destroyed, S. C. For. 145.

(t) *Colson v. Colson*, 2 Atk. 250.

(u) *Cowper v. Earl Cowper*, 2 P. Wms. 741.

(1) Vide *Lamberts' Lea. v. Paine*, 3 Cranch, 97.

to pass an Estate, but any words that show *the intention [*554 of the Testator, are sufficient (u). This intention is to be elicited from the whole Will taken together, but nothing *dehors* is allowed to be produced to explain the same, unless there be a *latent* ambiguity in the Will (x). (1) Every word is to have its effect if it possibly can (y). Every word is to be taken according to the natural and common import (z); (2) but whatever may be the punctuation (a), or the strict grammatical construction of the words of a Will, that is not to govern, if the intention of the Testator (b), from the words and the context of the Will unavoidably (c) requires a different construction (d). "If," says *Lord Alvanley*, "upon a general view of the Will I can collect the general intention, or any one particular object, and there are expressions in the Will in some degree militating with it, if I plainly see those expressions are inserted by mistake, I may reject them (e). But I cannot reject any words unless it is perfectly clear they were inserted by mistake (f); and if two parts of the Will are totally irreconcilable, I know of no rule but by taking the subsequent words as an indication of a subsequent intention (g)."

*In endeavouring to ascertain the meaning of a Testator, the absurdities, improbabilities, and inconsistencies, which may arise out of cases falling within one construction or another, have constantly been attended to, with a view of ascertaining such meaning (h). In the construction, therefore, of Wills, the Court will not exactly consider the order of placing the words, if it would better answer the apparent intent of the Testator otherwise, and render a limitation sensible (i);—but not to let in different Devisees and Legatees in a Will (k).

(u) *Dobbins v. Bowman*, 3 Atk. 409.

(x) *Andrews against Emmot*, 3 Bro. C. C. 303. See on this subject *Plaidoyes de le Maitre*, 722.

(y) *Lowther v. Earl Westmoreland*, 1 Cox, 67.

(z) *Vid. Thellusson v. Woodford*, 4 Ves. 329.

(a) *Sandford v. Raikes*, 1 Meriv. 651.

(b) *Ibid.*

(c) *Phillips v. Chamberlaine*, 4 Ves. 57.

(d) *Thellusson v. Woodford*, 4 Ves. 311.

(e) See accordingly *Haws v. Haws*,

3 Atk. 525.

(f) *In testamentis ratio tacita non debet considerari sed verba solum considerari debent. Multa possunt movere mentem testatoris, quæ nos latent, ideo per divinationem mentis durum est a verbis recedere.* Mantira, Lib. 6. c. 14.

(g) *Sims v. Doughty*, 5 Ves. 247; and see *Constantine v. Constantine*, 6 Ves. 102.

(h) Per Lawrence, Just. in *Leigh v. Leigh*, 15 Ves. 103.

(i) *East v. Cooke*, 1 Ves. 32.

(k) *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61.

(1) *Vide Mann v. Mann*, on appeal, 14 Johns. Rep. 1. S. C. 1 Johns. Ch. Rep. 231. *Dill v. Dill*, 1 Des. 237.

A will and codicil are to be construed together, as parts of one instrument. *Westcott v. Cady*, 5 Johns. Ch. Rep. 334.

(2) *Mann v. Mann*, on appeal, 14 Johns. Rep. 1. S. C. 1 Johns. Ch. Rep. 231. *Reasenell v. Thurman*, 1 Johns. Ch. Rep. 220. *Bunn v. Wintthrop*, 1 Johns. Ch. Rep. 329.

A mistake cannot be corrected, or an omission supplied, unless it is perfectly clear, by fair inference from the whole Will, that there is such mistake or omission (*l*). (1) Whenever there is a doubt, the safest way is to adhere to the words (*m*).

If words of *art* are used, they are to be construed according to the *technical sense* (*n*), unless by the *context*, or by *express words*, it is plain the Testator did not intend them to be taken in that sense (*o*). But the Court will abide by the *prima facie* intention, the settled meaning of the words, until driven out by strong, solid, *556] and rational interpretation, put *upon, and plain inference drawn from, the rest of the Will (*p*).

The Court are bound to carry the Will into effect, provided it is consistent with the Rules of Law; (2) for Men's Deeds and Wills by which they settle their Estates are the Laws that private Men are allowed to make, and they are not to be altered even by the King in his Courts of Law or Conscience (*q*).

General words in one part of a Will may be restrained by subsequent words, and must be construed so as not to defeat the intention of the Testator to be collected from any other part of the Will; (3) but where there is a manifest general intent, the construction should be such as to effectuate it, though by that construction some particular intent may be defeated (*r*).

Where words in a Will are capable of a two-fold construction, such construction is received as tends to make it good.

It has been said that, though the Court can construe and expound the words of a Testator's Will, yet they cannot strike them out of it entirely (*s*); and, certainly, a Court will not reject words having an obvious meaning, upon a suspicion that the Testator did not know what he meant (*t*), or a great improbability that he meant what he has said (*u*); but *words

(*l*) *Mellish v. Mellish*, 4 Ves. 49.
Phillips v. Chamberlaine, 4 Ves. 57.

(*m*) *Mellish v. Mellish*, 4 Ves. 50.

(*n*) *Lowther v. Earl of Westmoreland*, 1 Cox, p. 67.

(*o*) *Ibid.* and see *Holloway v. Holloway*, 5 Ves. 401, *Ambl.* 377. *Hodgson v. Ambrose*, *Dougl.* 337. *Phillips v. Garth*, 3 Bro. C. C. 68. *Doe v. Jesson*, 5 Maul. and Selw. 95.

(*p*) *Deane v. Test*, 9 Ves. 152, 154.

(*q*) *Lord Falkland v. Bertie*, 2 Vern. 337.

(*r*) 1 Barr. 38. 4 Term Rep. 82. 6 Cruise's Dig. 172. 2d edition.

(*s*) *Southcote v. Watson*, 3 Atk. 233.

(*t*) *Milnes v. Slater*, 8 Ves. 306.

(*u*) *Chambers v. Brailsford*, 2 Meriv. 25, 26. S. C. 18 Ves. 368.

(1) The introductory part of a will has some effect in the construction of subsequent bequests or devises. As where a testator directed his real estate to be sold by his executors, and the proceeds to be put at interest, and the interest to be paid annually to certain persons, and the survivors or survivor of them, but was silent as to the disposition of the principal, this was held to be a bequest of the principal as well as the interest; it being apparent from the introductory part of the will, that the testator did not intend to die intestate, in this respect. *Earl v. Grim*, 1 Johns. Ch. Rep. 494.

(2) Vide *Roosevelt v. Thurman*, 1 Johns. Ch. Rep. 220. *Lamberts' Les. v. Paine*, 3 Cranch. 97, 130.

(3) Vide *Lamberts' Les. v. Paine*, 3 Cranch, 97, 130. *Dill v. Dill*, 1 Des. 237.

may be rejected where they are repugnant to the clear intention manifested in other parts of the Will (*z*), and there cannot be any rational construction of those words as they stand (*a*); but a positive bequest cannot be controlled by inference and argument (*b*).

It has been observed, that if two parts of a Will are totally inconsistent, and cannot possibly be reconciled, the latter shall prevail. Where, however, the same thing has been by different parts of the Will given to two persons, doubts have been entertained whether they should not be joint-tenants.

If a meaning can be collected, but it is left wholly doubtful in what manner that is to take effect, the Will is void for uncertainty (*c*).

Such are the leading rules adopted in respect of judgments upon Wills; and it must be obvious, that a decision upon a perplexed Will must, unavoidably, very much depend on the judicial discretion of the Judge, and cannot, perhaps, be otherwise characterized, than as "the conjecture of the Judge upon the meaning of the Testator, after hearing his intention discussed upon the whole will (*d*)."

2. An *executory Trust* by Will is, where the Will does not give a legal Estate, but only creates a Trust to be carried into execution; where, in short, there is no direct Gift made, but it is left to the Law to frame the Conveyance under which the *Party is intended to take, by a general expression of intention (*e*).

The distinction between Trusts *executed*, and such as are *executory*, is this: A Trust executed is where the Testator has given *complete directions* for settling his Estate, with *perfect limitations*. An *executory Trust* is where the Testator's directions are *incomplete*, and are rather *minutes or instructions*. In the cases of Trusts executed, legal expressions will have a strict legal effect, as in immediate devises at Law, though, perhaps, contrary to the Testator's intention (*f*); but in cases of *executory Trusts* the Court will consider the intention, and direct the Conveyance according to it (*g*); and words of limitation, as "Heirs of the body," will be construed as words of purchase, if the Testator has, by expressions in his Will, shown an intention that they should be construed in that sense.

The execution of *executory Trusts* created by *Deed* is the

(*z*) *Holmes v. Cradock*, 8 Ves. 320.

(*a*) 2 Meriv. 25, 6. S. C. 18 Ves. 368.

(*b*) *Jones v. Colbeck*, 8 Ves. 42.

(*c*) *Constantine v. Constantine*, 6 Ves. 102.

(*d*) See what Lord Eldon says in *Deane v. Test*, 9 Ves. p. 152.

(*e*) *Countess of Lincoln v. Duke of*

Newcastle, 12 Ves. 231.

(*f*) See *Shaw v. Weigh*, 1 Eq. Abr. 194. *Jones v. Morgan*, 1 Bro. C. C. 206. *Poole v. Poole*, 3 Bos. and Pul. 620.

(*g*) *White v. Carter*, Ambl. 91. *Garth v. Baldwin*, 2 Ves. 655.

same as of executory Trusts created by Will (*h*), there being no difference between an executory Trust in Marriage Articles and in a Will, except that the object and purposes of the former furnish an indication of intention which must be wanting in the latter (*i*). Cases of this description arising out of *Marriage Articles* have before (*k*) been adverted to.

*559] *In the cases of *Trusts executed, or immediate Devises*, the construction of Courts of Law and Equity is the same, because the Testator is thought not to suppose that any further Conveyance will be made; but in *executory Trusts* he is thought to mean to leave *something to be done*, the Trusts to be executed in a more careful and more accurate manner; and for that reason the Court decrees according to the Intent, and not according to the strict legal effect of the terms used by the Testator (*l*). This doctrine appears to have been for the first time authoritatively settled in the *Attorney General v. Sutton* which went from the Exchequer to the House of Lords (*m*).

The case of *Papillon and Voice* (*n*) has often been quoted in illustration of the Rule of the Court on this subject; for in that case it is said (*o*) the legal rule prevailed as to that limitation in the Will which included or carried the *legal Estate*; and the intent was permitted to control the legal rule as to that part of the same Will, which was purely *executory*, though the words of the Will were, except as to this difference, exactly the same.

It will, however, be found, that though the distinction between Trusts executed and executory is well established, yet that *Papillon and Voice* is not an authority for it. According to a MS. Report of that case in the Author's possession, it appears, that *560] *after the Decree from the Rolls was appealed from, a *Supplemental Bill* was filed by the Plaintiff, setting forth, that upon his Father's death he covenanted to settle the Manor of *Great Bentley* to the use of himself for Life, with a Remainder to his first Son in Tail, and upon this the Counsel for the Defendant gave up the first point as to the Estate of *Great Bentley*; and the only question which remained for the Chancellor to determine was, what Estate the Plaintiff was to have in the Lands to be purchased with the moiety of the Father's personal Estate? What the Chancellor said is stated in the MS. Report alluded to, as follows: "Lord Chancellor—An Estate to one for Life, with a Remainder to the Heirs of his body, is, in Law, an Estate in Tail; and if a Man has made a Will we cannot control him,

(*h*) Vid. what Lord Eldon says, 12 Ves. 227.

(*i*) *Blackburn v. Stables*, 2 Ves. & Bea. 369, 370.

(*k*) Ante, p. 61.

(*l*) See *Glenorchy v. Bosville*, For. 19. S. C. MS. *Stamford v. Hobart*, 1 Bro.

P. C. 288. *Roberts v. Dixwell* 1 Atk. 607. *Sperling v. Toll*, 1 Ves. 70.

(*m*) 1 P. Wms. 753. S. C. MS.

(*n*) 2 P. Wms. 478. S. C. MS.

(*o*) 1 Fonbl. Treat. Eq. p. 303.

Fearne on Remainders, 146. last edition.

and say he ought to have made it otherwise. I am inclined to think this an Estate in Tail, but if you will, you shall have a case made for the opinion of the Judges ;” but that, the Counsel for the Defendants objected to, so it stood over till the next day, when the Chancellor continued of the same opinion as to the Letter of the Will ; but said, “as the Intent of *S. Papillon* was plainly that it should be an Estate for Life in his Son, and as they now come for aid from this Court, we ought to tie them down to what was intended by the Donor ; so decreed that his Trustees should find out a purchase as soon as they could, and that it should be conveyed to the Plaintiff for his Life, Remainder to Trustees to preserve, &c. with Remainder to his first Son, &c.”

It is very plain, therefore, that no *Decision* was made upon the Appeal in regard to that part of the *Devise which was [*561 a *Trust executed*, but only on that part of the Devise which was *executory*, and cannot, therefore, properly be cited as a *Decision* establishing the distinction between Trusts executed, and *executory Trusts*. That distinction, however, is fully established in the various cases before alluded to, as well as in others that may be mentioned.

The *Decisions* in these cases of *executory Trusts* do not arise, *Lord Hardwicke* says, from the Court’s making a different construction upon a Trust, that upon a legal Estate, but that some circumstance in the Will has induced the Court to make a narrower construction (*p*).

The cases have, in general, been where some clause repugnant to the nature of an Estate-Tail showed the Donor intended only an Estate for Life. An Estate granted or given by Will to *A.* for Life, and to the Heirs of the Body of *A.*, by the Common Law, and the well known rule in *Shelly’s case* (*q*), gives an Estate-Tail, and the same Rule prevails with respect to Trust-Estates ; but where the Testator by his Will directs his Trustees to convey to *A.* for Life, and to the Heirs of the Body of *A.*, the Trust is considered as *executory*, on account of the direction to the Trustees to convey ; and in such case the Court directs how the Party shall convey, and considers the intention of the Testator, and orders the Conveyance according to the form and method of conveyancing (*r*) ; and so as not to let it be in the power of the first taker to destroy the Contingent *Re- [*562 mainders (*s*). It directs, therefore, in such case, the Estate to be settled to *A.* for Life, with Remainder to *A.’s* first and other Sons successively in Tail general, remainder to *A.’s* Daughters in Tail generally as Tenants in common, with cross Remainders

(*p*) *Roberts v. Dixwell*, 1 Atk. 607. *Bastard v. Proby*, 8 Cox, 6.

609.

(*q*) 1 Co. 93.

(*r*) See *Roberts v. Dixwell*, 1 Atk.

(*s*) *Baskerville v. Baskerville*, 9 Atk. 279.

in Tail general, &c. (*t*). Nor does the Court in these cases give an equitable Estate for Life only, and *legal* Remainders to the Children (*u*). And where Lands were directed *to be settled* on *A.* and the Heirs of his body, with a proviso that it should not be in his power to dock the Entail, a strict Settlement was decreed (*x*).

So, where Lands were directed *to be conveyed* to *A.* for Life, with Remainder to the Issue of her body, a strict Settlement was decreed (*y*).

Wherever, indeed, in a *Will*, the testator has directed his Trustees in whom the legal Estate is vested *to Convey*, &c. this is an *executory Trust*, and the Court, as in cases of *Marriage Articles*, has it in its power to mould the Conveyance so as best to answer the intent of the Testator (*z*); but in all these cases the intention of the Testator must appear expressly or impliedly from expressions in the Will (*a*).

A Testator may give arbitrarily what Estate he thinks fit. There is no presumption that he means one quantity of Interest *563] more than another, an Estate *for Life rather in Tail or in Fee. The subject being mere bounty, the intended extent of that bounty can be known only from the words in which it is given; but if it is clearly to be ascertained from any thing in the Will, that the Testator did not mean to use the expressions which he has employed, in their strict, proper, technical sense, the Court in decreeing such settlement as he has directed, will depart from his words in order to execute the intention; but the Court must necessarily follow his words, unless he has himself shown that he did not mean to use them in the proper sense; and have never said, that merely because the direction was for an Entail they would execute that by decreeing a strict Settlement (*b*). A mere direction, therefore, to convey an Estate to *A.* and the Heirs of his Body (*c*), or to the Male Heir, or to the Male Heir by him (*d*), will entitle *A.* to a Conveyance to him of an Estate-Tail.

In Wills (*e*), as in Marriage Articles (*f*), cross Remainders may be raised by implication.

In all cases where the Testator has directed Money to be laid out in Land, it is not material whether he has used any tech-

(*t*) See *Bastard v. Proby*, 2 Cox, 6.

(*u*) *Ibid.*

(*x*) *Leonard v. Earl of Sussex*, 2 Vern. 526.

(*y*) *Glenorchy v. Bosville*, Forrester, 3. S. C. MS. and see *Sir J. Stamford v. Hobart*, 1 Bro. P. C. 288.

(*z*) *Marryat v. Townley*, 1 Ves. 130.

(*a*) *Stanley v. Stanley*, 16 Ves. 491.

(*b*) *Blackburn v. Stables*, 2 Ves. &

Bea. 370.

(*c*) *Legate v. Sewell*, 1 P. Wms. 87. *Bale v. Coleman*, 1 P. Wms. 142.

(*d*) *Blackburn v. Staples*, 2 Ves. & Bea. 367.

(*e*) *Marryat v. Townley*, 1 Ves. 102, 104. *Green v. Stevens*, 12 Ves. 419. 17 Ves. 64.

(*f*) *Twisden v. Lock*, Ambl. 663; and see 17 Ves. 67.

nical terms: if there be a clear intention, the Court will execute that intention, by correcting, adding, or altering the sense. The only question, where the Court is to be the Conveyancer, is, whether the intention of the Testator be against *any [*564 rule of Law, as to create a perpetuity for instance; but if the intention be according to the Rule of Law, it will give it effect (g).

The distinction between *Trusts executed* and *executory Trusts*, is, as we have seen, fully established in a variety of cases; but *Lord Hardwicke*, in his Decision in *Bagshaw* and *Spencer*, is supposed to have denied that there was any distinction between them; and is thought to have placed both on the same footing, by declaring that “*all Trusts are executory.*”

By this observation, it is apprehended, *Lord Hardwicke* did not mean to deny, however strongly and justly he may have disapproved, the distinction in Equity between those cases where the Estates are *finally* limited by the Will itself, without any kind of reference to any further execution of them, by a Conveyance directed by such Will, and those cases where the Will is only *directory*; and prescribes the intended limitations of some future Conveyance, or Settlement, directed by the Will to be made for the effectuating them; but that all he unequivocally and expressly denied was the *propriety of terming* the former class of cases “*Trusts executed.*” It was the complaint of a Logician.

The remark of *Lord Hardwicke* was not a new, nor a hasty, off-hand notion, then, for the first time entertained by the Chancellor. So long as ten years before, in the case of *Hopkins* and *Hopkins* (h), according to the Report in *Atkyns*, he had expressed *a similar opinion. Besides, too, there was, owing to [*565 the Trial of the Rebels, an interval nearly of three years between the hearing and the decision in *Bagshaw* and *Spencer*. Indeed, in one of the MS. Reports of this case with which the Author has been favoured, his Lordship prefaces his Judgment with an apology for the length of time it had been depending. It may therefore be fairly concluded, that this part of the Judgment was maturely and anxiously considered. If there was error, it was not casually or hastily adopted, but fallen into after an almost unprecedented length of deliberation.

According to *Atkyns's* Report of *Hopkins* and *Hopkins*, the Chancellor is reported to have said, “a distinction was taken between those cases and the present; that they were cases of extraordinary Trusts, where the Will itself directed a Conveyance, and where there is no Conveyance directed, but the Trust only declared by the Will. I admit the Court has thrown out such sort of expressions, but I think there is no difference; *all Trusts are executory*; and whether a Conveyance be directed by

(g) *Browne against De Laet*, 4 Bro. C. C. 535. (h) 1 Atk. 580.

the Will or not, this Court must decree one when asked at a proper time, but *I do not give any conclusive opinion to oust that distinction.*" The case of *Hopkins and Hopkins* has had its general correctness justly impeached by the late *Earl of Rosslyn*; but there is no reason to suppose it incorrect as to the passage quoted. The Author has in his possession a very excellent MS. note of that case; but certainly neither in that note, nor in the Report of the case by *Forrester* (i), is any thing to be found like *566] the marked *observation upon Trusts executed and executory, as is given in the Report of *Atkyns*.—But it seems highly probable that *Lord Hardwicke* did use some such language as is attributed to him; for in the Case alluded to of *Bagshaw and Spencer*, a case so long subsequent to *Hopkins and Hopkins*, and of which there are many Reports in print (k) and in manuscript, he lays down a doctrine every way inconsistent with that which he had promulged in *Hopkins and Hopkins*. His words in *Bagshaw and Spencer* are—"All Trusts are in the notion of Law executory, and are to be executed in this Court. At Law, before the Statute of Uses, every Use was a Trust; then the Statute executed the legal Estate, and joined it to the Use, and therefore a Trust executed is a legal Estate; and to bring it to a Trust in Equity, the legal Estate must want to be executed by a Conveyance." A doctrine so plainly and explicitly delivered seemed only to require to be stated in order to be understood, and to carry conviction.

The true objection of *Lord Hardwicke* was to the propriety of the term, which, as a Logician, seemed to him unwarranted and inaccurate, and as leading to confuse a subject already sufficiently intricate. It was to this classification of Trusts he decidedly and justly objected. He altered no Law; he shook no Decisions, as some seem to have thought, and have seriously, but undeservedly, objected to him. In fact, as the Term "Trust executed" had crept into general parlance, and as the phrase was convenient in argument, however wrong in its original introduction, *567] so we find *Lord Hardwicke* (to the great astonishment of many who have misinterpreted his sentiments) using the same term in cases anterior, as well as subsequent to, the case of *Bagshaw v. Spencer*, where he had so clearly evinced the impropriety of the term, though always accompanying the use of it with words expressive of the inexactness of its first introduction.

Lord Northington, alluding to *Lord Hardwicke's* determination in *Bagshaw v. Spencer*, said, it was "right, sound, and certain (l)." *Lord Mansfield*, so long the pride and glory of his country, on more than one occasion, countenanced *Lord Hardwicke's* proposition, and distinctly expressed his concurrence.

(i) Cas. Temp. Talbot, p. 44.

(l) See *Rosseau v. Rede*, 2 Eden.

(k) The best report of this case is in p. 7.

1 Vol. Collectanea Juridica, 413.

In the celebrated case of *Perrin and Blake*, his Lordship, upon the first argument, observed, that the distinction between *Trusts executed* and *Trusts executory* was not founded in sense. He observes, "it is absolutely necessary to the very existence of a Trust that it be executory, because a 'Trust executed is within the Statute of Uses. And this," says he, "*Lord Hardwicke* particularly remarks in *Bagshaw v. Spencer*." It is thus he calls in the aid of *Lord Hardwicke's* opinion to sanction his own, gives credit to that opinion, and delivers his own without the least symptom of doubt or hesitation. In his *Judgment* in *Perrin v. Blake* (m) he observes, that he argued *Bagshaw v. Spencer* in every stage of it. Thus interested, as he must have been, and anxious, and certainly well able, to sift every part of the *Judgment* *of *Lord Hardwicke* in that case, he afterwards, in [*568 February 1769, elevated as he had recently been, to the distinguished situation of Lord Chief Justice, with the eyes of all upon him, a period of upwards of twenty years after the decision in *Bagshaw v. Spencer*, confirms, in the strongest language, the doctrine of *Lord Hardwicke*. But this is not all: in a subsequent case of *Long v. Laming* (n), his Lordship reiterates the opinion, and observes, "*there was no solidity in the distinction, all Trusts are executory*." Thus again adhering to the very words of *Lord Hardwicke*, and further observing upon Trusts, in conformity with the Chancellor, "they are to be executed by a Conveyance, and the Parties have a right to apply to a Court of Equity for such Conveyance." With respect therefore to the distinction between Trusts executed and Trusts executory, the opinion of *Lord Mansfield* was in exact conformity with that of *Lord Hardwicke*; their very phraseology almost tallies. If *Lord Mansfield* so far misunderstood *Lord Hardwicke* as to suppose that the Chancellor not only repudiated the Term, *Trusts executed*, but also the cases and distinctions to which that Term was applied, he certainly went far beyond the meaning of *Lord Hardwicke*.

After so plain, and so studied an exposure of the impropriety of the distinction between what have been called Trusts executed, and Trusts executory, proceeding too from Characters so eminent, from as great a Chancellor, and as distinguished a Chief Justice, as ever adorned this country; both of whose abilities *and virtues were so nicely matched, that more than [*569 once in my hearing, the late *Lord Chief Justice Kenyon* protested, "he hardly knew which to think was the greatest man," it might have been imagined that the supposed propriety, or the supposed necessity, of the term *Trust executed*, would not again have been vindicated. It has, however, found its advocates,

(m) 1 Vol. *Collectanea Juridica*, 318. (n) 2 Burr. 1108.

and among the most formidable of these, we may rank the able and ingenious *Mr. Fearne*, who is indeed *ipse agmen*, and has devoted many a page of his profound and incomparable *Essay on Contingent Remainders* to a long and elaborate exposure of what he considers to be the erroneous doctrine of *Lord Hardwicke*. According to *Mr. Fearne* (o), a Trust executed is where the Trust is directly and wholly declared by the Testator to attach on the Lands immediately under the Will itself, that is, where the Estates are finally limited by the Will itself, without any kind of reference to any further execution of them by a Conveyance directed by that Will; and he describes executory Trusts as being those which are only directory, or prescribe the intended limitations of some future Conveyance or Settlement, directed by the Will to be made for the effectuating them. According to this mode of arguing, *Mr. Fearne* affixes a very different idea to the term "Trust executed" to what *Lord Hardwicke* and *Lord Mansfield* affixed to it. By the term "Trust executed," they meant legal Estates, become such by the Statute of Uses, where no subsequent Conveyance was *570] necessary; and to such an Estate *they thought the term "Trust executed," exclusively applicable. The words of *Lord Hardwicke* in *Bagshaw v. Spencer* are expressly to this effect, "a Trust executed is a legal Estate," and the words of *Lord Mansfield*, in *Perrin v. Blake*, are to the same effect: "A trust executed is within the Statute of Uses, or in other words, is a legal Estate." We must particularly observe, that neither in a Trust executed, nor a Trust executory, according to *Mr. Fearne's* definition of it, is the legal and equitable Estate united; for in both those Trusts, as described by him, a Conveyance by the Trustees would be necessary to give the legal Estate to the Cestui que Trust: so that whether a Conveyance were directed by the Will or not, the Court of Chancery must decree one at a proper time, as *Lord Hardwicke* observed in *Hopkins v. Hopkins*; and a Conveyance being in both cases to be made, the Trust the Chancellor rightly considered as in all cases executory. "One essential part of the Trust is, that the Trustee is to convey the Estate at some time or other; sometimes it is to be done sooner, and sometimes later; and this whether the Testator has directed it or not, and so much every Testator is presumed to know. One may therefore *reasonably doubt* how it can make any substantial difference whether the Testator has in words directed a Conveyance or not; since the Law, that is, the course of the Court, takes notice that the Testator could not intend his Estate should always remain in the Trustees, but that one principal confidence reposed in them *571] is to convey (p)." *The propriety of the distinctions

(o) *Contingent Remainders*, 4th Edition, p. 217, &c.

(p) *Collectanea Juridica*, 413.

couched under the terms, Trust executed and executory, was always doubted by *Lord Hardwicke*; but the denomination, *Trust executed*, he was clear was bad.

But, says *Mr. Fearne*, *Lord Hardwicke* negatived the idea that by Trusts executed he meant *legal Estates*, or *Uses executed*; and then by inferences somewhat forced, and by what may be fairly termed a torture of words, he cites some expressions from *Roberts v. Dixwell*, a case anterior to *Bagshaw v. Spencer*, from which he insists that *Lord Hardwicke* did not mean what he said in *Bagshaw and Spencer*, for that must really be the case if we do but consider how explicit the opinion of *Lord Hardwicke* is in *Bagshaw and Spencer*, as to his idea of what was styled a 'Trust executed. *Mr. Fearne's* words are these; "as *Lord Hardwicke* did not expressly draw the line between Trusts executed and executory, it may possibly be suggested, that he ranked all Trusts under the description of executory, and meant, by Trusts executed, legal Estates or Uses executed." Can there be a doubt of it? What *Mr. Fearne* considers as a possible suggestion of the reader, was, as plain as words could represent, the very point which *Lord Hardwicke* laboured so much to support, and in which he was seconded by *Lord Mansfield*. *Mr. Fearne* continues; "we are to remember he in fact negatived any such conclusion, when he said in *Roberts and Dixwell*, to be sure, where an Estate has been granted, or given by Will to A. for Life, and to the Heirs of the body of A. such a Devise has been by the Common Law united so in the first person as to convey to him an Estate-Tail; *that the [*572 same construction too had prevailed in Trust-Estates; but in the Case before him he said, "there were all sorts of Trusts, &c. but the latter part of the Trust was *merely executory*. Now here," says *Mr. Fearne*, "he expressly distinguished between legal Estates and Trusts in general, and between several sorts of Trusts; but, therefore, in terming one sort of Trust executory, he recognised a distinction between that and other Trusts that were not so, and clearly pointed out the nature of that distinction, by saying the Trust in question was *merely executory*, and to be carried into execution, and referring to the very cases in which the line of distinction between Trusts executory and executed had been explicitly and clearly drawn." How it was that *Mr. Fearne* could promulgate sentiments such as these it is difficult to divine. After *Lord Hardwicke* had observed so explicitly in *Bagshaw and Spencer* that "all Trusts are executory," and "that a Trust executed was a legal Estate," how could it be possible to doubt his meaning? How was it possible to suppose, as *Mr. Fearne* has supposed, that *Lord Hardwicke* did not mean to rank all Trusts under the description of executory, nor mean by Trusts executed, legal Estates or Uses executed?

The case of *Roberts and Dixwell* seems by no means to affix

to the phrase "*Trust executed*," that sort of sanction for which *Mr. Fearne* so strenuously contends. It may be proper to give the passage at full length, and thus enable the reader more correctly to form his judgment respecting the true and natural import of what *Lord Hardwicke* has said. "To be sure, where an *573] Estate has been given or granted to A. *for Life, and to the Heirs of the body of A. such a Devise has been by the Common Law so united in the first person as to convey to him an Estate-Tail; and the same construction too has prevailed with respect to Trust-Estates. But in the present case here are all sorts of Trusts, as to mortgage, sell, &c. but the latter part of the Trust is merely executory, to be carried into execution after the performance of antecedent Trusts; the whole direction, therefore, falls upon this Court, and they are to direct how the Parties are to convey. This Court have taken much greater liberties in the construction of executory Trusts than where the Trusts are actually executed." It cannot be denied, that *Lord Hardwicke* has used in this Case the terms *Trusts executed* and *Trusts executory*, and in the sense which *Mr. Fearne* affixes to them; but it must be allowed to deny that the propriety of the terms are any way established by that Case. *Lord Hardwicke* thought the phrase *Trust executed* improper; but as it had crept into usage with the Profession, and as it was only a quarrel with the propriety of the name, and whether so denominated or not it did not affect the substance of any of the Decisions, he has more than once used the term, not only in the case of *Roberts* and *Dixwell*, and *Baskerville* and *Baskerville*, as mentioned by *Mr. Fearne*, but also in *Exell* and *Wallace* (q), which is not alluded to by *Mr. Fearne*; but in this latter case he pointedly shows his continued distaste of the term, by the marked phrases, "what is *574] called a *Trust executed*;" "making it *executed*, as it is called;" expressions which do very sufficiently testify his rooted dislike to the term, the denomination, *Trust executed*; a dislike first promulgated, as before observed, in *Hopkins* and *Hopkins*, (a Case to which *Mr. Fearne* does not allude,) and most zealously adhered to in his solemn deliberate Judgment in *Bagshaw* and *Spencer*, a Case very long subsequent to *Roberts* and *Dixwell*, and *Baskerville* and *Baskerville*, so much relied upon by *Mr. Fearne*.

It was never doubted by *Lord Hardwicke* but that there were some sorts of Trusts so created that the Court, following Precedents, would not interfere with them in a discretionary manner, and that there were others, with which the Court would interfere or carry into execution, according to the apparent intent of the Party; on the contrary, he has often acted upon such a distinction, though he disapproved of it, and would not have adopted it if it had not been fortified with Decisions; but to say that the

(q) 3 Ves. 223.

former sort of Trusts should be denominated *Trusts executed*, and the latter kind, *Trusts executory*, seemed to him giving improper names to things, and engendering a confusion of Terms. Who can write more forcibly than *Mr. Fearn* himself has written upon this head? No complaining Logician has ever made a better remark; "A confusion of terms in any science tends to confound the science itself, by destroying that precision of ideas, that distinction among its objects, which is the very groundwork of all knowledge. *Nomina si perdas distinctio rerum perditur*" (r). According to *Mr. Fearn*, there must be two sorts of Trusts executed; Trusts executed at Law by the [*575 Statute of Uses, and Trusts executed in Chancery, which appears to be incurring that sort of censure for confusion of terms which *Mr. Fearn* has so well inveighed against in others. Can any other instance be given where Lawyers have applied the same term to express two very different things? Does any other science afford such an instance?

The Cases of the *Earl of Stamford v. Sir John Hobart*, *Papillon* and *Voice*, and *Lord Glenorchy* and *Bosville*, have before been referred to. The first and last establish the position already alluded to, and which may be repeated, that there are some Trusts, as for instance, where a Conveyance is directed by the Will, in which the Court will interfere and decree an execution of such Trust, according to the intent and meaning of it; and that there are other Trusts, such as where no conveyance is directed, but where the Trusts are fully limited and declared by the Instrument creating the Trust, in which the Court will not interfere; but does it follow from hence that the one ought properly to be termed Trusts executory, and the other, Trusts executed? for really, all the question with *Lord Hardwicke* was, as to the propriety of the term. He did not say the above-mentioned decisions were bad, but though not satisfactory, he felt the necessity of abiding by them, and uniformly acted upon them: he only objected to the term, Trust executed, used in the discussion of those and other Cases, and which he considered as an improper expression, because it had been previously appropriated.

*In *Exell* and *Wallace* (s), before adverted to, *Lord* [*576 *Hardwicke* says, in allusion to *Bagshaw* and *Spencer*, "I did not there say no weight was to be laid upon the distinction" (between Trusts executed and executory); "but that if it had come recently before me I should then have thought there was little weight in it; but that I should have that deference for my predecessors as not to lay it out of the case; not intending to say that all which my predecessors did was wrong founded; which I desire may be remembered."

Ought *Mr. Fearn* to have omitted this important passage?

(r) See *Collectana Jurid.* 1 Vol. (s) 2 Ves. 323.
238.

He has not even alluded to this case! Is it not destructive of his Imputation? Does it not show the consistency of *Lord Hardwicke* in his opinion, and his submission, reluctant, undoubtedly, to the Authorities? Where then was his Error?

In this attempted vindication of *Lord Hardwicke*, a deviation has been made from the plan pursued by the Author, of stating the substance of the Decisions without commenting upon them; but feeling an extreme veneration for the memory of *Lord Hardwicke*, it seemed a sort of duty to endeavour to rescue his judicial character from what appeared to be an unwarranted imputation of a serious Error; and it is satisfactory to think, that in the way in which the subject is now considered, the Decisions, instead of being jarring and dissonant, are wholly reconciled; or if *Bagshaw* and *Spencer* must be considered as an exception, and that the expressions of the Will in that Case did not bring it *577] within the doctrine, as to executory Trusts, the Decision must be viewed as "an anomalous Case," as *Mr. Fearne* terms it, or at most, as a wrong conclusion from right principles; and that *Lord Hardwicke* improperly considered it as a Case falling within the rules applied to executory Trusts; for that he considered it as an executory Case seems clear.

There is a wise observation of *Lord Coke*, which *Mr. Fearne*, most able as he was, would have done well to remember: "Note, Reader," says he; "the office of an Interpreter is to make such construction, not only that one and the same author be not against himself, but also that the Resolutions or Judgments reported in one book, be not, by any literal interpretation, expounded against any Resolution or Judgment reported in any other, but that all, *si fieri possit*, may stand together (t)."

Under this head of executory Trusts, Devises for the payment of Debts are classible, but as such Devises are connected with the doctrine respecting the administration of Assets they will be more conveniently considered as a part of that subject.

Implied Trusts.

WE shall now treat of *Implied Trusts*; under which head may be classed the doctrine as to *The Administration of Assets*; and also of *Legacies*; for Executors and Administrators, if not expressly Trustees in regard to the Payment of Debts and Legacies, *578] and the other duties of their office, are impliedly so, *in the consideration of a Court of Equity. We shall afterwards observe upon *Resulting Trusts*, including Trusts which arise from Purchases made *in the name of a third Person*; or *with notice of a Trust*.

The whole Jurisdiction of Courts of Equity in the administration of Assets is founded on the principle, that it is the duty

(t) 3 Rep. 84b.

of the Court to enforce the execution of Trusts; and that the Executor or Administrator (t) who has the Property in his hands is bound to apply that Property in the payment of Debts and Legacies, and the remainder according to the Will, or in case of Intestacy according to the Statute Distributions. The sole ground on which Courts of Equity proceed in Cases of this kind is *the Execution of a Trust* (u). (1).

Even where the Testator directed that the Executor should not be compelled by Law to declare the amount of a Residue bequeathed by the Testator, the Court directed an account against him (x).

It is plain that Executors or Administrators have not any legal or beneficial Interest in the Personal Estate, but are invested only with a legal Power over it, just as every Trustee has a legal Power over *his* Trust Property (y); for it will not pass [*579 under general words in a grant of their Property (z); it is not liable for their Debts either on an Execution (a), or Bankruptcy (b); nor (unless under particular circumstances,) vests in the Husband of a Feme Executrix or Administratrix (c); nor is it forfeitable for their crimes (d). If they had any legal or beneficial Interest in the Personal Estate they would have a power of bequeathing it by Will, but this they have not, except, indeed, that the Executor of an Executor who has proved (e), represents the original Testator; but the Executor of an Administrator, or the Administrator of an Executor, does not (f).

The doctrines as to the administration of Assets are clearly settled; but as *Lord Hardwicke*, even in his time observed, "points with regard to Assets are numerous enough (g)." It seems, however, that the right of the Court to decree a distribution of Assets was not fully settled till about the time of the *Lord Keeper North*, who overruled a Demurrer to a Bill for that purpose (h), as did also his successor, *Lord Jefferies*, in a Case

(t) An Administration taken out here will not extend to Colonies: but an Agent there who gets in Assets under an exemplification of the Probate, and a Letter of Attorney from the Executor, is chargeable as much as if the Executor had got them in himself. *Atkins v. Smith*, 2 Atk. 63.

(u) *Adair v. Shaw*, 1 Sch. & Lefr. 261; and see 2 P. Wms. 161, 211. *Elliott v. Collier*, 1 Ves. 16. S. C. 3 Atk. 527. *Hovey v. Blakeman*, 4 Ves. 607. *Ripley v. Waterworth*, 7 Ves. 452; and see 7 Ves. 197.

(x) *Gibbons v. Dawley*, 2 Chan. Cas. 198.

(y) *Duke of Rutland v. Duchess of Rutland*, 2 P. Wms. 211; and see *Humphrey v. Bullen*, 1 Atk. 458.

(z) *Lord Raym.* 1307.

(a) *Farr and Newman*, 4 T. R. 621.

(b) 1 Atk. 158.

(c) *Quick v. Staines*, 1 Bos. & Pul. 293. If Personal Estate belonging to the Wife as Executrix, be assigned by the Husband in Trust, as he should appoint, the Assignment alters the Property in the Estate, and if no Appointment is made, it is Assets of the Husband. *Ashfield v. Ashfield*, 2 Vern. 287.

(d) Off. Exec.

(e) *Day v. Chapfield*, 1 Vern. 200.

(f) 2 Black. Com. 506.

(g) *Smith v. Hoskins*, 3 Atk. 337.

(h) *Howard v. Howard*, 1 Vern.

(1) Vide *M'Kay v. Green*, 3 Johns. Ch. Rep. 50.

where a Bill was filed by an Executor against a Creditor to take an Account of Assets, and settle the priorities of Creditors, *580] *which was demurred to as multifarious; but the Demurrer was overruled, and the Bill not only held to be proper, but a safe way for an Executor to take (i). From that time such Suits became frequent; and it has been held that an Account may be decreed of an Intestate's personal Estate, notwithstanding an Account before taken, and a Distribution decreed, in the Spiritual Court (k).

After a Suit for an Account of Assets is instituted against an Executor in a Court of Equity, he has not been allowed payments *voluntarily* made without Suit (l); and it has also been holden, that a Judgment confessed by an Executor, pending a Bill in Equity, shall not be allowed upon an Account of Assets (m). Certainly, Debts paid by an Executor or Administrator after a final *Decree* upon an account taken, will not be allowed (n), though in such case they are permitted to stand in the place of the Creditors so paid (o).

If there be two Creditors, and one files a Bill, and obtains a final Decree, and a Report of the Master, and that Report has been confirmed, and then the other brings a Bill, and obtains a final Decree, and his demand is confirmed, the Executor must pay him first who used the first diligence.

If a *Decree* be obtained on a Creditor's Bill (p) for the Administration of Assets, and some of the Creditors sue at Law, *581] the Court will interpose by Injunction *to restrain them; but until a *Decree* is obtained no Injunction can issue (q). If *before* a *Decree* obtained, several Creditors proceed by different Bills in Equity, for satisfaction of their demands, the Court will not stop the Suits because of the priority which may be gained, although this creates an entanglement and difficulty upon the Estate; but *after* a *Decree* obtained, an Injunction would be granted, because the Executor could not plead it at Law (r).

When a *Bond-Creditor* files a Bill on behalf of himself and others, or for his own particular Debt, the course of the Court is, to direct an Account of *all* the Bond-Debts of the Testator or Intestate, with liberty to come for a satisfaction; and in such Case the Court will not after a Decree for a Sale suffer another Bond-Creditor, who has obtained Judgment, to proceed against the Estate (s).

(i) Buckle v. Atles, 2 Vern. 37.

(k) Bissell v. Axtell, 2 Vern. 47.

(l) Bright v. Woodward, 1 Vern. 369. S. P. 2 Ch. Cas. 202. Darston v. Earl of Oxford, Prec. Ch. 188. Joseph v. Mott, Prec. Ch. 79.

(m) Surrey v. Smalley, 1 Vern. 457; but see Goodfellow v. Burchett, 2 Vern. 499.

(n) Perry v. Phillips, 10 Ves. 34.

(o) Jones v. Jukes, 2 Ves. jun. 518.

(p) Ashley v. Pocock, 3 Atk. 208.

(q) Martin v. Martin, 1 Ves. 213. Mosher v. Reed, 1 Ball & Beat. 320; and see Paxton v. Douglas, 8 Ves. 520.

(r) Martin v. Martin, 1 Ves. 213.

(s) Ibid. 214.

If a simple contract Creditor files a Bill for the payment of his own Debt only, the Court does not direct a general Account of the Testator's Debts ; but the course appears to be, to direct an Account of the Personal Estate, and of that particular Debt ; and whether the Balances in the hands of the Executor would, by reason of any Specialty or other Debts due from the Testator, be the respective Balances coming from them to be applied in a course of Administration, and then the Plaintiff's Debt will be ordered to be paid out of such Balance (1). (1)

If the Court, on a Bill by a Bond-Creditor, decrees *a [*582 Sale, in which the Heir joins, and another Bond-Creditor brings an Action at Law to have satisfaction out of it, and the Heir pleads *riens per descent* he will be charged with the Sum of Money for which the Estate sold, he having joined in the Conveyance ; nor would the Common Law Court take notice that it was done by a Sale in Equity ; but upon a Bill by the Heir at Law he would have an Injunction (y).

If Creditors omit to file a Bill against a Devisee in Trust of Lands to compel a Sale, they will not be allowed to disturb a fair Purchaser who has been in quiet Possession for a length of time, sixteen years, for instance, of the Trust Estate (z).

The payment of Debts is the leading duty of an Executor. The order in which Assets are administered, and the question, what is a good legal Debt, are pure questions of Law, the consideration of which is not within the plan of this Work. No question that can arise as to such Debts, in the administration of legal Assets, is determined in a Court of Equity until it is first ascertained whether the Debt be good at Law ; and if the Court has a doubt, the Bill is retained, with liberty to the Plaintiff to proceed at Law (a) ; on this head, therefore, it is only necessary to make a few observations.

A Debt due by Bond, and a Debt due for Rent, stand upon the same footing in the administration of Assets (b).

In the usual administration of Assets, a Bond-Creditor must be paid before a Simple Contract Creditor, *but in the Dis- [*583 tribution of the *separate Property of a Feme Covert*, a Bond-Creditor has no priority, but all debts are paid equally (c). The presumption of Payment of a Bond after twenty years may be

(1) Attorney-General v. Cornthwaite, 2 Cox, 44.

(y) Martin v. Martin, 1 Ves. 214.

(z) Elliott v. Merriman, 2 Atk. 43. S. C. Barn. 78.

(a) Hartwell v. Hartwell, 4 Ves. 815.

(b) Showell v. Coledrop, 17 May 1745. MS. overruling the Case in 1 Ves. 490. 1 Ray. 515.

(c) Anon. 18 Ves. 258. It is said in this case the Bond was void, but see ante, p. 474.

(1) Quere, whether a creditor in an ordinary case, and without some special cause, can come into Chancery, to collect his debt, from an executor or administrator, or merely to enforce a rateable distribution of assets? *M'Kay, v. Green*, 3 Johns. Ch. Rep. 56.

repelled by evidence that the Obligor had no means of payment (d).

Interest is not allowed on a Bond beyond the Penalty ; but it has been held, that if the Devisee or Trustee neglects to pay in a reasonable time, he shall after such neglect, pay Interest beyond the Penalty (e).

An Executor is not compellable either in Law or Equity to take advantage of the Statute of Limitations against a demand otherwise well founded (f).

An Executor or Administrator may, as against Creditors of equal degree, retain out of the Assets a Debt due to himself, and this, it seems, though the Debt be more than six years old ; for as an Executor may pay a Debt to another, though he might have pleaded the Statute of Limitations, why may he not pay himself (g) ? He may also retain a Debt due in Trust for himself (h) ; nor is this right of retainer prejudiced by the circumstance that the administration is granted to another for the use of the Creditor, a Lunatic, any more than if granted *durante* *584] *minoritate* (i). And though the Administrator die before he appropriates Assets in the payment of his Debt, his Executor may retain (k). So, also, the Executor of a sole Executor may retain (l). It has been doubted whether an Heir, being a Creditor by Bond or Judgment, may, like an Executor, retain (m).

Under a Covenant made with a retiring Partner, as soon as could be, to pay the Debts and indemnify him against them, which Covenant was broken by the death of the Covenantor, leaving Debts undischarged, which Debts were paid by the other, it was held, that the Covenant made the Debt a Specialty, and that the Administrator could not retain his own simple-contract Debt, as he might do as against other Debts of the same degree (n).

It is observable, also, that at Law, if a Creditor appoints his Debtor Executor, the Debt is extinguished and cannot be revived (o) ; but in Equity, the Executor is, as to Creditors and

(d) Fladong v. Winter, 19 Ves. 763 ; and see Lane v. Casey, 2 Black. 965 ; and see as to administration of retaining. Anon. 2 Ch. Cas. 55.

(e) Anon. 1 Salk. 154.

(f) Norton v. Freker, 1 Atk. 526. Lord Castleton v. Lord Fanshaw, 1 Eq. Abr. 305 ; and see what is said *Arguendo* in Buckmaster v. Harrop, 13 Ves. 469. S. C. MS.

(g) In Hopkinson v. Leech, 7 May 1819, MS. V. C. Leach was of opinion he might retain, but he directed the opinion of a Court of Law to be taken.

(h) Cockroft v. Black, 2 P. Wms. 298. Weeks v. Gore, 3 P. Wms. 184, in note B. Franks v. Cooper, 4 Ves.

763 ; and see Lane v. Casey, 2 Black. 965 ; and see as to administration of retaining. Anon. 2 Ch. Cas. 55.

(i) Franks v. Cooper, 4 Ves. 763.

(k) 3 P. Wms. 184, in note b.

(l) Vid. Hopton v. Dryden, Prec. Ch. p. 180. See Croft v. Pyke, 3 P. Wms. 183, where the point was discussed, but not decided.

(m) Solley v. Gower, 2 Vern. 62.

(n) Masson v. May, 3 Ven. & Bea. 194.

(o) Hudson v. Hudson, 1 Atk. 411. Fox v. Fox, 1 Atk. 463. Wankford v. Wankford, 1 Salk. 299 ; but see Phillips v. Phillips, 2 Freem. 11.

Legatee, on a deficiency of Assets (p), considered as a Trustee in respect of the Debt, and accountable for it, as part of the Testator's Personal Estate (q). Nor is he entitled *to retain [*585 his Debt if the Testator bequeaths away "all his Debts" (r); for the implied Gift, by making the Debtor Executor, is then considered as controlled by the express Bequest of the Debt (s).

In regard to the payment of Debts, there is an anomalous Case, which may be mentioned, founded on what has been called, a *subtle Equity*, and it is this: If an Annuity be secured by Bond in bar of Dower, the Widow is entitled to be paid, in the first place, out of the Personal Estate, and in aid of that is entitled to come upon such Real Estate as would have been liable to Dower, if she had not accepted the Annuity (t).

Where a Wife's Estate is mortgaged, for the benefit of her Husband, she has, if she survives, a right, after all his Debts are paid, to stand as a Creditor against his Assets (u), (unless at the time of the Mortgage a Settlement is made upon her) (x); but Evidence is admissible to show that the Wife intended otherwise. The Title of the Wife to be exonerated is considered as precisely the same with that of the Heir (y). If the mortgage of the Wife's Estate is not for the Husband's Debts, or for Debts due from the Wife *dum sola* (z), his Assets, though he join in *the [*586 Mortgage, are not primarily liable (a). And where the Wife has the absolute disposal of the Money, though she appropriates it to the use of the Husband, his Assets are not liable (b).

On the same principle, if a Father, Tenant for Life, and his Son, join in raising Money, which is received by the Father, he is bound to exonerate the Son's Estate from the Encumbrance (c).

Where Husband and Wife live together, she is not entitled to an Account of her separate Estate against his Creditor and Assignee, nor against his Representative, any farther back than from

(p) *Phillips v. Phillips*, Velv. 160. S. C. 2 Freem. 11; and see *Brown and Selwyn*, For. 242. S. C. MS.

(q) *Fox v. Fox*, 1 Atk. 463. *Cary v. Goodinge*, 3 Bro. C. C. 110; and see *Vin. Abr.* vol. 8. p. 198. *Askwith v. Chamberlain*, 1 Chan. Rep. 138. *Field v. Clarke*, *ibid.* 242.

(r) *Browne v. Selwyn*, For. 242. S. C. MS.

(s) *Ibid.*

(t) *Tow v. Earl of Winterton*, 1 Ves. jun. 451. S. C. 3 Bro. C. C. 489.

(u) *Fate v. Austin*, 1 P. Wms. 264. S. C. 2 Vern. 689. S. C. on Appeal, 1 Bro. P. C. 1; and see *Parteriche v. Powlett*, 2 Atk. 384. *Inclendon v.*

Northcote, 3 Atk. 486, and *Lewis against Nangle*, Ambl. 150. S. C. 1 Cox, 240. *Astley v. Earl of Tankerville*, 3 Bro. C. C. 545.

(x) *Lewis v. Nangle*, Ambl. 150.

(y) *Clinton against Hooper*, 3 Bro. C. C. 201. S. C. 1 Ves. jun. 173.

(z) *Lewis v. Nangle*, Ambl. 150.

(a) *Bagot v. Oughton*, 1 P. Wms. 347. S. C. *Fortescue*, 332. Mod. Cas. 249, 381; and see *Clinton against Hooper*, 3 Bro. C. C. 211. S. C. 1 Ves. jun. 188.

(b) *Clinton v. Hooper*, 3 Bro. Ch. Ca. 213.

(c) *Piers v. Piers*, 1 Ves. 522.

the *death* of the Husband (*d*), unless he promised to pay the arrears (*e*).

With respect to *Assets*, they are either real or personal, and legal or equitable. *Legal Assets* are such as constitute the Fund for the payment of Debts according to their legal priority. *Equitable Assets* are such as can be reached only by the aid of a Court of Equity, and are divisible, *pari passu*, among all the Creditors. Every thing may be considered as equitable Assets, which the Debtor has made subject to his Debts generally, and which, without his Act, would not have been so subject (*f*). *587] Equitable Assets *in the hands of an Executor are in some respects applied as legal Assets are; as first to pay Debts, and then Legacies (*g*); but, as observed, they differ in this, that all the Creditors take proportionably, and not in a course of Administration, as in the case of legal Assets (*h*). (1) And where a Testator lets in Creditors by a *charge*, it is now settled, whatever doubts may formerly have been entertained, that Creditors are to be paid in preference to Legatees (*i*).

The ordinary Administration of real and personal Assets in the payment of *Specialty Debts* is in the following order:

1. *Personal Estate*, (with the exception of Copyholds, which are not Assets) (*k*), not specifically bequeathed, or exempted expressly, or by plain indication from the payment of Debts (*l*).
2. *Lands expressly devised* for (not merely charged with) the payment of Debts (*m*).
3. *Descended Estates* (*n*).

(*d*) See *Smith v. Lord Camelford*, 2 Ves. jun. 716. *Dalbiac and Dalbiac*, 16 Ves. 126; and see *Parkes and White*, 11 Ves. 225, and *Squire against Dean*, 4 Bro. C. C. 326. *Brodie v. Barry*, 2 Ves. & Bea. 39; but see *Parker v. Brookes*, 9 Ves. 588, and the Cases cited in note to *ex parte Elder*, 2 Madd. Rep. 286.

(*e*) *Ridout v. Lewis*, 1 Atk. 269.

(*f*) 2 Fonbl. Eq. 398, in note.

(*g*) *Hixon v. Witham*, 1 Vern. 482. *Walker v. Meager*, 2 P. Wms. 552. S. C. Mos. 204. *Maylin v. Hoper*, Cas. Temp. Hardw. 206. *Contra Gosling v.*

Dorney, 1 Vern. 482.

(*h*) *Solley v. Gower*, 2 Vern. 62.

(*i*) *Kidney v. Coussmaker*, 12 Ves. 155.

(*k*) *Parker v. Dec*, 2 Chan. Cas. 201.

(*l*) *Samwell and Wake*, 1 Bro. C. C. 145. 1 Bro. C. C. 58. *Davis v. Topp*, 1 Bro. C. C. 526. S. C. 2 Bro. C. C. 259, in note; and see 1 Bro. C. C. 58.

(*m*) *Davis v. Topp*, 1 Bro. C. C. 528.

(*n*) *Ibid.* *Barnwell v. Lord Cawdor*, 3 Madd. Rep. 453.

(1) Assets may be partly legal and partly equitable, and in the distribution of them, the court will discriminate, following the rule of law, as to the former, so as to prevent confusion in the administration, and applying the latter, rateably, among all the creditors. *Moses v. Margetreyd*, 1 Johns. Ch. Rep. 119.

4. *Lands charged with the payment of Debts* (n). (1)

*The same Administration of Assets is made in the [*588 payment of *simple contract* Debts, except that as to them descended Estates are not liable, unless in those cases where the deceased Debtor was *at the time of his death* (o) a *Trader*, according to the acceptation of that word in the Bankrupt Laws (p).

The *personal Estate* is the fund first liable to the payment of Debts, and is often called "the natural fund;" (2) nor can a Testator, as against his Creditors, exempt the personal Estate; but he may give his personal Estate as against his Heir, or any other Representative, clear of the payment of his Debts (q); provided the Will contains express words for that purpose, or, (a doctrine much lamented) (r) a plain manifested intent (s)—a declaration plain, or necessary inference, tantamount to express words (t), showing an intent not only to charge the real Estate, but to discharge the personal (u). It is not, however, *required that the intention should be so manifested as [*589 that all Persons cannot fail to agree with respect to it; but so as to convince the mind of the Judge deciding the particular

(n) Vid. *Harmood v. Oglander*, 8 Ves. 124, 5; and see *Davis and Topp*, 1 Bro. 524. *Donne against Lewis*, 2 Bro. C. C. 263. *Manning and Spooner*, 3 Ves. 117. *Milnes v. Slater*, 8 Ves. 306. The distinction between Land *expressly devised*, or only *charged* with the Payment of Debts, seems to apply in this instance only. The idea which formerly prevailed, that where Lands were expressly devised for the Payment of Debts, the personal Estate ceased to be the primary fund for the Payment of Debts, though it remained so where there was merely a *charge* of the Debts upon the real Estate, is exploded. In both cases the personal Estate remains primarily liable. See *Stapleton v. Colville*, For. 208. S. C. MS. *Lord Inchiquin v. French*, Ambl. 38. *M'Clelland v. Shaw*, 2 Sch. & Lefr. 545.

(o) See *Hitchin v. Bennett*, 4 Madd. Rep. *Keene v. Riley*, 3 Meriv. 436.

(p) 47 Geo. 3, sess. 2. c. 74. s. 1. This Act, it is observable, does not extend to Copyholds.

(q) *Walker v. Jackson*, 2 Atk. 624. *Bridgman and Dove*, 3 Atk. 202. *Attorney-General and Downing*, Ambl. 572, 3.

(r) See *Ferreges v. Robinson*, Bunb. 301. *Ancaster against Mayer*, 1 Bro. C. C. 462. *Watson v. Brickwood*, 9 Ves. 453. *Hancox v. Abbey*, 11 Ves. 187.

(s) *Ayliffe v. Murray*, 2 Atk. 60. The first case proceeding on this principle seems to have been *Stapleton v. Colville*, For. 202. S. C. MS.

(t) *Milles v. Slater*, 8 Ves. 305; and see also *Brydges v. Phillips*, 6 Ves. 567. *Read v. Litchfield*, 3 Ves. 475. *Brummell v. Prothero*, 3 Ves. 111. *Burton v. Knowlton*, *ibid.* 109. *Tower v. Lord Rous*, 18 Ves. 132. *Lord Inchiquin against French*, Ambl. 37. S. C. better reported 1 Cox, 1. The only case to the contrary is *Webb v. Jones*, 2 Bro. C. C. 60.

(u) *Bootle v. Blundell*, 1 Meriv. p. 193. *Barnwell v. Lord Cawdor*, 3 Madd. Rep.

(1) Vide *Livingston v. Newkirk*, 3 Johns. Ch. Rep. 312. *Livingston v. Livingston*, 3 Johns. Ch. Rep. 148.

(2) Vide *Lupton v. Lupton*, 2 Johns. Ch. Rep. 614. *M'Key v. Green*, 3 Johns. Ch. Rep. 56. And though the real estate be charged with the payment of debts and legacies, yet it cannot be resorted to, until the personal estate is exhausted. *Lupton v. Lupton*, *ut supra*. Vide *Arden v. Arden*, 1 Johns. Ch. Rep. 313. And a court of chancery will not interfere with the law of descent of real estate, or the established order of distribution of personal property, for the purpose of shifting the burden of paying the debts of the intestate, from the personal to the real estate, or correct any supposed hardship or inequality produced by the law. *Thompson v. Tappan*, 5 Johns. Ch. Rep. 518.

question (x). It is impossible to define what circumstances will be sufficient to show this intention; it must arise from the context of the Will (y). The cases are numerous. The intention may be found, not merely in the mode in which the personal Estate is given, but also in the mode in which the real Estate is given, or the application directed to the payment of a Debt; for the real Estate may be so appropriated to the payment of the Debt as to show a clear intention that it shall not be a burden upon any other Fund, though an intention to exonerate the personal Estate is not in any other way expressed (z). (1) Circumstances from which an inference has been ordinarily raised, as that of the same person being constituted Trustee of the real Estate and Executor; the personal Estate being given as a residue, or as personal Estate generally, or after an enumeration of particulars; the residuary Legatee being also Devisee of the real Estate, or of part for life, or otherwise, are circumstances entitled to consideration only in reference to the context of every particular Will in which they occur. The amount of the personal Estate is not a circumstance to be inquired into so as to form a ground for construction (a).

A mere gift of the Personal Estate does not exonerate it from *590] the payment of Debts (b), unless *it be a specific Gift (b), as, where there is a Gift to a Wife of her Paraphernalia (c); and though a Will show a clear intent in favour of a Legatee to exonerate the personal Estate from the payment of a particular Debt, yet if by the death of the Legatee it lapses, the next of Kin cannot insist on the exoneration, but it devolves in the ordinary way (d).

A Testator devised a part of his real Estate to Trustees in Trust, to sell and pay certain Debts mentioned in a Schedule, and then devised all his personal Estate to his Wife, "fully and clearly exonerated from all the Debts in the Schedule specified;" and he settled the residue of his real Estate on his Wife and Child. The Trust Estate not being sufficient to pay the sched-

(x) *Bootle v. Blundell*, 1 Meriv. p. 273. 193.

(y) *Ancaster against Mayer*, 1 Bro. C. C. 460, 462. *Tait v. Lord Northwick*, 4 Ves. 823.

(z) *Hancox v. Abbey*, 11 Ves. 186.

(a) 1 Meriv. 193.

(b) *Brummell v. Prothero*, 3 Ves. 111. *Phillips v. Phillips*, 2 Bro. C. C.

(b) *Walker and Jackson*, 2 Atk. 624. S. C. 1 Wils. 24; and see *Bunb. 302. Ex parte Dennison*, 3 Ves. 552. *M'Clelland v. Shaw*, 2 Sch. & Lefr. 544.

(c) *Boynton v. Packhurst*, 1 Bro. C. C. 576.

(d) *Hale v. Cox*, 3 Bro. C. C.

324.

(1) Where a testator directed, that his real estate should be subject to his debts, it is such an expression of his intention to exonerate the personal estate, specifically bequeathed, from his debts, that it shall be disburthened; though the will was not so executed as to pass real estate. *Dunlop v. Dunlop*, 4 Des. 305.

wled Debts, the settled Estates, it was held, were applicable in exoneration of the personal Estate (e).

So where there was a direction to sell the Testator's real Estate, and out of the produce to pay his Debts, and the residue of the purchase-money to be added to his other personal Estate, which he bequeathed, this Devise was held to be incompatible with the idea that the personal Estate should be applied in the first instance, and the purchase-money of the real Estate was held applicable in exoneration of the personal Estate (f).

The mere nomination of an Executor, though *under [*591 circumstances that would give to him beneficially the personal Estate, and not leave it distributable to the next of Kin, will not have the same effect as a distinct specific gift of it to an individual (g).

A Devise of real Estate upon condition that the Devisee shall pay Debts and Legacies (h), or even of real Estate to be sold for the payment of Debts, however anxiously provided, does not exonerate the personal Estate (i); for, as it is said, such a Devise shows nothing more than an intention that all the Debts shall be paid, and that the real Estate, *if that is necessary*, shall be applied; but a direction to apply a *particular portion* of the real Estate for the payment of one *particular Debt*, would, it seems, exonerate the personal Estate as to that Debt (k).

Where a Mortgagor of Lands covenants to pay, and dies, though, as to the Mortgagee, the Land may be looked upon as the security on which he relies, yet the Mortgage is considered as a general Debt, and the Land only as a Security, and the personal Estate is applicable in its discharge (l); and this, though there may be younger Children of the Mortgagor who may be no otherwise provided for (m). The same Rule is applied also in favour of an Heir, *and of a Devisee of the Estate (n); [*592 but it would be otherwise if any *Creditors* of the Testator would lose their Debts by the Mortgage being paid out of the personal Assets (o).

(e) *Morrow v. Bush*, 1 Cox, 185.

(f) *Webb v. Jones*, 1 Cox, 245.

(g) *Grey v. Minnethorpe*, 3 Ves. 106. *Stapilton v. Colville*, For. 202. S. C. MS.

(h) *Gower v. Mead*, Prec. Chan. 2.

(i) *Tait v. Lord Northwicks*, 4 Ves. 816. *Dolman and Weston*, 1 Dick. 96. S. C. 3 Vern. 740. Prec. Ch. 456. contra *Adams v. Merrick*, Eq. Ca. Abr. 371. *Bicknell v. Page*, Atk. 78.

(k) *Hancox v. Abbey*, 11 Ves. 186; and see *Spurway v. Glynn*, 9 Ves. 483, and *Mangan v. Masson*, 1 Ves. & Bea. 418.

(l) *Evelyn v. Evelyn*, 2 P. Wms. 665. *Lanoy v. Duke and Duchess of Athol*, 3 Atk. 455. *Robinson v. Gee*, 1 Ves. 252.

(m) *Bartholomew v. May*, 2 Atk. 487.

(n) See contra as to Devisee, *Leigh v. Lutkins*, For. 83. S. C. MS. and *Lovel v. Lancaster*, 3 Vern. 193; but see Lord Hardwicke's remarks on that Case, 2 Atk. 487, and Forrester against Lord Leigh, Ambl. 173. *Astley v. Earl of Tankerville*, 3 Bro. C. C. 545. *Serle v. St. Eloy*, 2 P. Wms. 386.

(o) 2 Atk. 487.

If a man purchases an Estate subject to a charge, and does no more than covenant with the Vendor, that he shall be indemnified, it does not become his own Debt, to be paid out of his personal Estate, but it remains a charge upon the Estate, or rather a Debt of his own in respect of the Estate only; and if nothing more has been done to take it upon himself, the Debt must be paid out of that Estate, and not out of his personal Estate (p). So if an Estate *descends* to one, subject to a Mortgage, although the Mortgage be afterwards assigned, and the Party to whom it descended enter into a Covenant to pay the Money borrowed, it will not primarily bind his personal Estate (q), but will be considered only as a *Security* (r). But the Party may by his acts make it a Debt of his, if from such acts it can be necessarily inferred that he meant to make it a Debt of his own (s); if the *593] charge is part of the price, in such *case the personal Estate is liable (t). Suppose a man makes a Contract, pledging both his real and personal Estate, the latter by a general obligation, and part or the whole of his real Estate, as a specific pledge by way of Mortgage, and the Estate descends upon his Son as Heir at Law, and the personal Estate goes to the Executor, the question is, who pays the Debt? It was a mixed Debt of the Father, but the Son's only as Owner of the collateral Pledge, and he has a right to call upon the personal Estate. Therefore, if a Person succeeding to an Estate of that kind has done no act to adopt the Debt, and make it his personal Debt, his personal Estate is not liable; but if by his acts he has put himself so far in the place of his Ancestor as to make the Debt his own, that is understood to be the same as if he was the original Mortgagor; but the Court has been extremely anxious not to make that inference, unless where it is perfectly clear and obvious; therefore, though the Mortgagee pressing for his Money, the Heir is obliged to have a transfer of the Mortgage, and as no Assignee will take it without some personal Covenant upon that transaction, he executes a Bond to the new Mortgagee, if he does it only for that purpose, not meaning to make himself more liable, it has been determined not to make it the personal Debt of the Party whose original Debt it was not (u).

*594] If a Person who is Master of both Funds charges *a

(p) *Butler v. Butler*, 5 Ves. 538. *Tweddell v. Tweddell*, 2 Bro. C. C. 101. 152. *Woods v. Huntingford*, 3 Ves. 131. *Parsons v. Freeman*, Amb. 115. *Forrester against Lord Leigh*, Amb. 173; and see *Earl of Oxford v. Lady Rodney*, 14 Ves. 417; and *Shaftoe v. Shaftoe*, 1 Cox, 207.

(q) *Earl of Tankerville against Fawcett*, 2 Bro. C. C. 58. S. C. 1 Cox, 237.

(r) *Evelyn v. Evelyn*, 2 P. Wms. p. 664.

(s) *Woods v. Huntingford*, 3 Ves. 128.

(t) *Billinghurst against Walker*, 2 Bro. C. C. 608.

(u) *Woods v. Huntingford*, 3 Ves. 131; and see *Billinghurst against Walker*, 2 Bro. C. C. 608, and *Donisthorpe v. Porter*, 2 Eden, 164.

personal Debt on the real Estate, his Heir shall not have it exonerated by the personal Estate (x).

Where a Purchaser of an Equity of Redemption dies, the personal Estate will not be applied for the benefit of the Heir, it not being the Ancestor's Debt (y).

If the Heir tells the Executor to pay the Legacies, and that he will not press him for the exoneration of his Estate, and the Executor pays upon that assurance, the Executor cannot be called upon afterwards, or the Legatees be obliged to refund (z).

Before the Statute of 3 and 4 Will. and Mary, c. 14, the Heir was not bound by Lands descending to him, where sold or aliened before Action brought; and if an Obligor devised his Land, the Devisee so selling was not liable to the Obligee (a): that Statute, therefore, was passed to remedy the defect in the Statute (13 Eliz. c. 5,) of fraudulent Conveyances, and to extend it to fraudulent Devises (b), and render the Heir liable for the value of Assets aliened (c). Since this Statute, therefore, a Reversion in Fee, coming into the Possession of a Son, as Heir to his Father, who died indebted by Specialty, in Assets for the payment of such Debts, though it be devised by the Son (d).

So if there be a Son and Daughter by one Venter, *and [*595 a Son by the second Venter, and the Father dies indebted, and the Son by the first Venter enters and dies seised, the Daughter is entitled by way of *possessio fratis*, but is liable to her Father's Debts (c).

By the express words of the Statute (3 & 4 Will & Mary, c. 14,) where there is any Devise or Appointment by Will, of Lands for payment of Debts, or Children's Portions (other than the Heir at Law), according to an Agreement before Marriage, such Will shall be of force. And though the Statute prevents a Devise for payment of Legacies, so as to disappoint Creditors by Specialty, it does not prevent a Devise for payment of Debts generally; though the effect of such a Devise is to let in Creditors by simple contract, to the prejudice of Creditors by Specialty (d); who in such case having no specific Lien on the Land (e) (if they be Debts or Judgments that affect the Land it is otherwise) (f), must come in with the other Creditors *pro*

(x) Hamilton against Worley, 4 Bro. Wms. 775.
C. C. 199.

(y) Pockley v. Pockley, 1 Vern. 36.
Tweddell v. Tweddell, 2 Bro. C. C. 107,
154.

(z) Seal against Brownton, 3 Bro. C.
C. 214. S. C. 1 Ves. jun. 185.

(a) Fremoult v. Dedire, 1 P. Wms.
431.

(b) Kinaston v. Clark, 2 Atk. 204.

(c) See Coleman and Winch, 1 P.

(d) Kinaston v. Clarke, 2 Atk. 204.

(e) Kinaston v. Clarke, 2 Atk. 205.

(f) See Freemoult v. Dedire, 1
P. Wms. 430. 3 Atk. 630. Kidney
v. Coussmaker, 12 Ves. 154. Rich-
ards v. Lord Macclesfield, 1 July 1805.
MS.

(g) Deacon v. Smith, 3 Atk. 326.

(h) Woolstoncroft v. Long, 1 Ch.

Cas. 32. Anon. 3 Salk. 83.

rata (f), for there is no relief but in a Court of Equity, as they could have no Action against the Heir, or against the Heir and Devisee jointly (g).

If there be a Devise of real Estate for the payment of Legacies, and specialty Creditors file a Bill for the payment of their *596] Debts, the *parol* shall not demur *though the Heir be an Infant; for the Legatees had a right to have their Legacies immediately raised, they being expressly charged on the real Estate; but the Legacies could not be raised until the specialty Creditors were satisfied, and therefore the payment of the specialty Debts was incidental to the raising of the Legacies, which takes the case out of the common rule of the *parol* demurring, so far as respects the charged Estate (h).

A Devise for payment of Debts takes the case entirely out of the Statute (i), and it stands, as it would have done, before the Statute was made; and the Creditor can claim only under the Will. If, therefore, an Estate be devised to Trustees, in Trust, *out of the yearly Profits*, to pay Debts, &c. the Creditors cannot obtain a Decree for a *Sale of the Estate* (k), though had there been no Devise for payment of Debts, the specialty Creditor would (under the Statute) have had a right to have his Debt raised by Sale; but though a Bequest by Will, or a Charge (l,) in Law or Equity for payment of Creditors, is not fraudulent within the Statute of Fraudulent Devises (m); yet if a Devise for the payment of Debts be in a manner *which will not answer the purpose*, such Devise does not take the case out of the Statute (n). A direction in a Will of real Estate to pay simple contract Creditors before those by Specialty, *is effectual within the exception in the Statute; but a Devise to pay Debts, excepting a Debt as Security, was held not to be a good Devise within the Statute (o). Directing an Estate to be sold for the payment of Debts does not imply that it must be sold at all events, if the Debts can be satisfied without (p).

Where a Will creates a charge upon the Realty for the payment of Debts, it relates to the time of the death of the Testator, and all Debts he contracts during his whole Life will be a charge (q); unless they be Debts *ex malificio*, as by being an Executor and wasting the Assets, in which case such Debt is

(f) *Hearnes v. Bance*, 3 Atk. 630.

(g) 2 Ves. 590; and see *How and Chapman*, 4 Ves. 550.

(h) *Mould v. Williamson*, 2 Cox, 386.

(i) 3 Wm. and Mary, c. 14.

(k) *Lingard against Darby*, 1 Bro. C. C. 312.

(l) *Hargrave v. Tindal*, 1 Bro. C. C. 135. *Batson v. Lingreen*, 2 Bro. C. C. 94. *Bailey v. Elkins*, 7 Ves. 222, 3.

(m) *Bayley v. Elkins*, 7 Ves. 323.

Hughes against Doulben, 2 Bro. C. C. 614. *Lingard v. Earl of Derby*, 1 Bro. C. C. 311.

(n) *Hughes against Dolben*, 2 Bro. C. C. 624. S. C. 2 Cox, 170; but see *Willes's Reports*, p. 524.

(o) *Vernon v. Vawdry*, Barn. 304, said Arg. o. to be confirmed by the Registrar's Book. Coop. 45.

(p) *Elliot v. Merryman*, 2 Atk. 45.

(q) *Brudenel v. Boughton*, 2 Atk. 273. *Bridgman v. Dove*, 3 Atk. 201.

not considered within the meaning of the provision in the Will (r).

And if a Person owing simple contract Debts, barred by the Statute of Limitations, devises his Lands in Trust to pay his Debts, the Debt is, according to several cases, revived (s); but the reason of this is not very obvious (t).

*If Land is devised to Trustees and their Heirs to sell, [*598 and out of the Money arising by the Sale to pay Legacies, and among the rest, a Legacy to the Heir at Law, the Land will not be turned into personal Estate, nor more directed to be sold than what is necessary for the payment of the Legacies, and the Heir has the Surplus (u); nor is there any case in which it has been held that the Surplus, after the particular purpose is answered, forms part of the personal Estate, so as to pass by a residuary bequest (x). (1)

Cases on Wills are very numerous, upon the question, whether the terms used amount to a Charge of the Debts upon the real Estate. The Court is always anxious on these occasions to make a man do that which is morally just (y), and hinder him, as it hath been said, from sinning in his grave; and in one case the Court has even held, that if the Testator talks about Debts in the beginning of his Will, the real Estate must be charged (z); and a Will has been construed for the benefit of Creditors, to charge real Estate (though not expressly mentioned) by implication on general words, but that implication may be afterwards destroyed (a). In a doubtful case the Court inclines to construe a Will in favour of Creditors, rather than against them, but does not insert or strain words for that purpose (b).

If a Testator says, "my Debts and Legacies being first deducted, I devise all my Estate real and personal *to I. S." [*599 This amounts to a devise to sell for payment of Debts (c); but if the Testator directs merely that "all his Debts and Funeral Ex-

(r) Price v. Morgan, 2 Ch. Cas. 215.

(s) Goston v. Mill, 2 Vern. 141. S. C. Pre. Ch. 9 Gilb. Lex Præst. MS. Blake-way v. Strafford, 2 P. Wms. 373. S. C. Select. 57. Jones v. Earl of Strafford, 3 P. Wms. 84. Lacon v. Briggs, 3 Atk. 107. Aughterlony v. Lord Power, Amb. 231. Anon. 2 Salk. 154.

(t) In one of the Cases Lord Hardwicke says, "I have often wondered how this Rule at first prevailed, and Judges have always grumbled at it, though it is now established in Equity." Lacon v. Briggs, 3 Atk. 107. This doctrine, however, seems to have stood only upon Dicta, and not upon express and solemn decision. [See the elabo-

rate Judgment of the Vice-Chancellor in Burke v. Jones, 2 Ves. & Bea. 278, &c. and also Executors of Fergus v. Gore, 1 Sch. & Lefr. 109, and the note.]

(u) Randall v. Bookey, 2 Vern. 425.

(x) Manghan v. Masson, 1 Ves. & Bea. 416.

(y) 3 Ves. 551. 5 Ves. 361, and 2 Ves. 312.

(z) Williams v. Chitty, 3 Ves. 552.

(a) Thomas v. Britwell, 2 Ves. 313.

(b) Noel v. Weston, 2 Ves. & Bea. 274.

(c) Newman v. Johnson, 1 Vern. 45.

penses should be paid and satisfied by his Executors," and the real Estate is *specifically devised*, these words will not charge the real Estate (d). (1)

Where a Testator directed his Trustees to possess themselves of his Estate and Substance, and to pay Debts, this was held to be a charge of the Debts upon the real Estate (e).

And it seems, that wherever a Testator says, "he wills that his Debts shall be paid," that will ride over every disposition, either as against his Heir at Law, or Devisee (f).

By a Devise, therefore, "after payment of his Debts," the Debts are charged (g); and if there be a Charge of all the Testator's Estates for payment of Debts, and a particular Estate is devised to A. the Devisee takes, subject to the Debts (h).

A general charge upon Land for payment of Debts, where the Testator has Freehold and Copyhold, renders the Copyhold liable, as well as the Freehold (i); and if he has surrendered the Copyhold to the use of his Will, the Freehold and Copyhold are *600] applicable *rateably; but if he has not surrendered the Copyhold, then, as before observed (k), it shall not be applied until the Freehold is exhausted (l).

If there be a general Charge of Lands by Will, for the payment of Debts, and a Devise afterwards of a particular Estate for that purpose, it will not restrain the general Charge, unless there be express negative words (m).

If there be a Devise of Lands to executors until Debts are paid, with Remainder to the Testator's Son in Tail, and the Son dies before the Debts are paid, the Estate of the Executors is only a Chattel Interest, and will not hinder the Son's Wife of Dower; but the Dower will not commence in Possession, nor are damages recoverable for detaining it, but from the time of the Debts being paid (n).

(d) Powell v. Robins, 7 Ves. 209. Brydges v. Landen, cited 3 Ves. 550. Keeling v. Brown, 5 Ves. 359; and see a Case of this nature Davis and Gardiner, 2 P. Wms. 187.

(e) Foster v. Cooke, 6 Ves. 347.

(f) Shalcross v. Finden, 3 Ves. 739.

(g) Ibid. 738.

(h) Clarke v. Sewell, 3 Atk. 100.

(i) Coombes against Gibson, 1 Bro.

C. C. 273. Kentish against Kentish, 5 Bro. C. C. 257.

(k) Ante, p. 68.

(l) Growcock v. Smith, 2 Cox, 397.

(m) Ellison v. Airey, 2 Ves. 568. Lord Warrington v. Booth, 1 Bro. P. C. 455.

(n) Hitchens v. Hitchens, 2 Vern. 404.

(1) Real estate is not charged with the payment of legacies, unless the intention of the testator to that effect, is expressly declared, or clearly to be inferred from the language and dispositions of the will. The usual clause of devising all the rest and residue of the testator's real and personal estate, not before devised, or the mere direction that all debts and legacies are to be paid, will not be sufficient to show an intention to charge the real estate: But it is otherwise, if the real estate be devised, "after payment of debts and legacies." *Lupton v. Lupton*, 2 Johns. Ch. Rep. 614.

A Testator by Will charged all his Estates with the payment of his Debts, and appointed his Son residuary Devisee; afterwards he purchased Copyholds, which were duly surrendered to the use of his Will, and by a Codicil devised the Copyholds to his Son in Fee. The Codicil was held to be a republication of the Will, so as to subject those Copyholds to the payment of his Debts (n).

Where sums are by Will directed to be raised by the *Rents and Profits* of an Estate within a particular time, within which the Estate would not answer the Charge, the Court has directed a Sale or *Mortgage (o); and has proceeded still farther, and directed a Sale on the words *Rents and Profits* alone (p), (though this is seldom agreeable to the Testator's intention,) on the ground, that *Rents and Profits* in a Will mean the Land itself (q). If, however, a Trust be created for the payment of Debts, by perception of *Rents and Profits*, or by mortgaging, the Land cannot be sold for that purpose, as it might have been if only the words *Rents and Profits* had been used (r); and so where there was a power of making Leases in order to raise Money for payment of the Debts, it was held there could not be a Sale, because such a power would be frivolous, if a Sale was intended (s). In cases of this kind a private Act of Parliament is sometimes resorted to (t).

Where Lands are devised to Trustees to raise Money for several purposes, and they raise the Money out of the Profits, the Land is thereby discharged, and the Persons interested must resort to the Trustees (u).

If one by Will directs his Lands to be sold, but does not say by whom, his Heir, and not his Executors, must sell (x).

If a Real Estate be once charged by a Will duly executed, with the payment of all Debts (y), *Legacies (z), and Annuities, (not merely particular Legacies (a), as, "Legacies above mentioned" (b), or "hereby given") (c), the Testator may afterwards give either Legacies or Annuities, (Annuities are held to be Legacies (d), unless the Testator himself distinguishes

(n) Rowley v. Eyton, 2 Meriv. 128.

(o) Richards v. Lord Macclesfield, 1 July 1805. MS.

(p) Berry v. Askham, 2 Vern. 26. Lington v. Foley, 2 Chan. Cas. 205.

(q) Baines v. Dixon, 1 Ves. 41; and see Green v. Belcher, 1 Atk. 506.

(r) Vid. Ridout v. Earl of Plymouth, 2 Atk. 104. Lingard v. Earl of Derby, 1 Bro. C. C. 311.

(s) Ivy v. Gilbert, 2 P. Wms. 13. Baines and Dixon, 1 Ves. 42.

(t) See the recommendation in Ridout v. Plymouth, 2 Atk. 105.

(u) Prec. Ch. 144.

(x) Bentham v. Wiltshire, 4 Madd.

Rep. 46; but see contra Els. Ob. 93. Grounds and Rudiments, &c. p. 311.

(y) See Cox v. Bassett, 3 Ves. 163.

(z) Brudenel v. Boughton, 2 Atk. 274. Buckeridge v. Ingram, 2 Ves. jun. 665.

(a) See 2 Ves. jun. 665.

(b) Masters v. Masters, 1 P. Wms. 423.

(c) Bonner v. Bonner, 13 Ves. 379.

(d) See Duke of Bolton v. Williams, mentioned in Habbergham v. Vincent, 2 Ves. jun. 231. Sibley v. Perry, 7 Ves. 534.

them) (e) by an *unattested* codicil. The rule is so settled in many cases (f), and is too well established to be disturbed; though it has been doubted whether it is perfectly consistent with the Statute of Frauds: for, in effect, the Testator disposes of his Land by an unattested codicil, when he is at liberty to burden it with Legacies so given; and it is observable that, all these have been cases, not of a primary charge, but auxiliary, and in aid of the personal Estate, which is the primary fund (g). But Legacies out of a Real Estate given by an unattested paper cannot stand, unless that paper is clearly referred to by Will duly executed, so as to be incorporated with it (h); and if a Testator *603] by his Will does not say *that all Annuities and all Legacies he shall hereafter give shall be charges, but only, that, if at some future period he shall think proper to declare Legacies and Annuities to be charges upon the Real Estate, then the Trustees shall pay them out of the Real Estate, this the Law will not allow: it will not allow a Person by Will duly executed to reserve a power to charge by a Will not duly executed (i).

If a Testator says he charges all the Legacies given by his Will upon his Real Estate, and gives 20*l.* to A., he may by an unattested codicil give that Legacy of 20*l.* to B. A Person in such case cannot create new Legacies; but he may modify or alter any before given; he cannot give fresh Legacies upon Land, unless future Legacies are charged; but he may substitute one for another (k).

Where a Person, seized of three or four Estates, devises one Estate for the particular purpose of paying his Debts, that is applied, and not the other Estates, though they descend; but if after the Devise by a Testator, of the whole of his Estate at the time of the Devise, subject to a *general Charge* (not to a *particular Charge*, which would make a difference) for the payment of Debts, and he becomes possessed by Devise, or purchase of another Estate, which *descends*, such Estate is applicable to the payment of Debts before the Estate so generally charged with the payment of the Debts; for when a general Charge is made *604] applicable to the whole Estate of the Testator *at the

(e) As in *Nannock v. Horton*, 7 Ves. 391.

(f) *Hyde v. Hyde*, Eq. Ca. Abr. 409. S. C. 3 Chan. Rep. 155. Lord Inchiquin and O'Brien, Ambl. 33. Masters and Masters, 1 P. Wms. 423. Jackson and Jackson, in n. 3 to 1 P. Wms. 423. S. C. 2 Cox, 35. Hannis v. Packer, Ambl. 556. Brudenell v. Boughton, 2 Atk. 268. *Habergham v. Vincent*, 1 Ves. jun. 411. Leacroft against Maynard, 3 Bro. C. C. 233. S. C. 1 Ves. jun. 279. *Reay v. Hopper*, decided by Lord Kenyon, and mentioned in *Habergham v. Vincent*, 2 Ves.

jun. 231. *Cox v. Bassett*, 3 Ves. 163, 4. Attorney-General and Ward, 3 Ves. 327. *Rose v. Cunynghame*, 12 Ves. 37, &c. *Bonner v. Bonner*, 13 Ves. 383.

(g) *Habergham v. Vincent*, 4 Bro. C. C. 389. *Hooper and Goodwin*, 18 Ves. 167.

(h) *Smart v. Prujean*, 6 Ves. 560.

(i) Vid. *Rose v. Cunningham*, 12 Ves. 29; and see *Habergham v. Vincent*, 2 Ves. jun. 236, and 4 Bro. C. C. 370, 1.

(k) *Attorney-General v. Ward*, 3 Ves. 331.

time, no intention appears that the Estate is so charged with a view to exonerate future Property; but where a Testator charges part of his Estate, leaving other part to descend, his inclination to burthen a part in exoneration of the rest is manifest (*l*).

The Heir at Law is deemed a necessary party to a Bill to carry into execution the Trusts of a Will disposing of Real Estate, by Sale or Charge of the same; and such Bill usually prays that the Will may be established against him by the Decree of the Court. If the Heir at Law be out of the Jurisdiction of the Court, and that fact is charged and proved, the Court will proceed to direct the execution of the Trusts, upon full proof of the due execution of the Will, and the sanity of the Testator, though that Evidence cannot be read against the Heir if he should afterwards dispute the Will; and the Court therefore cannot establish the Will against him, or in any manner ensure the Title under it against his claims. If no Heir can be found, and the Escheat be to the Crown, the King's Attorney-General must be made a Party;—if any Person claims the Escheat against the Crown that Person is a necessary Party (*m*).

Where a Copyhold Estate charged with the payment of Debts, is limited to *A.* for Life, with Remainder to *B.*, and the Estate is sold under the direction of the Court, it will not compel the Purchaser to pay in his Purchase-Money, if the *Re- [*605 mainder Man is abroad, and has not surrendered (*n*).

Where Lands devised are directed to be sold for the payment of Debts, and the Devisee is an *Infant*, the Estate cannot be sold till he comes of age (*o*). In the mean time, all the Court does is to declare that the simple contract Creditors are entitled to stand in the place of the specialty Creditors, with liberty to apply when the Infant comes of age to have the Estate sold to pay their Debts (*p*).

Where Estates are devised to Trustees, their Heirs and Assigns upon Trust to sell the same, and pay the produce (subject to certain Charges) to several Persons named, and it is declared that the receipts of such Trustees shall be sufficient discharges, &c. it is not necessary that the Persons so entitled to the Purchase Money (not, as it seems, the Heir at Law) should be Parties to the Conveyance; nor can they be called upon to enter into Covenants for the Title in proportion to the Interest they respectively claim in the Purchase Money (*q*).

(*l*) *Davis v. Toppe*, 1 Bro. C. C. 528.

(*m*) See *Redesd. Tr. Pl.* 139, 140; and see *McClelland v. Shaw*, 2 Sch. & Lefr. 548, and *Noel v. Weston*, Coop. 141.

(*n*) *Noel v. Weston*, Coop. 138.

(*o*) 7 Ves. 211. In the case of an infant devisee the parol cannot demur. 4 East, 484.

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(*p*) *Powel v. Robins*, 7 Ves. 211; and see *Charles v. Andrews*, 2 Mod. 151, 3. *Cooke v. Parsons*, 2 Vern. 429. See *vid.* *Mould v. Williamson*, 2 Cox, 386, & *Williams v. Whynates*, 2 Bro. C. C. 399.

(*q*) *Wakeman v. Duchess of Rutland*, 3 Ves. 504. S. C. confirmed on Appeal. 8 vol. Bro. P. C. p. 146, *Topham's* Edit.

Where a Real Estate is charged by a Will in aid of the Personal Estate, the old Practice of the Court was first to administer the Personal Estate, and if that was deficient to raise the residue from the Real Estate; but now, if the Master foresees that the Personal Estate will be deficient, it is the habit of the Court *606] *to permit a Sale of the Real Estate in the mean time (r). (1)

It was formerly held that where Trustees in a devise for the payment of debts were also made *Executors*, the Assets were *legal*. It was so considered at Law (s), and the Decisions in Equity followed the Law (t); except where the Devise of the Lands was to the Executor, *and his Heirs, in trust to sell, &c.* in which case, the Court decided, the Lands would be *equitable Assets*; because, as the Lands must go in a course of descent, he must take as Trustee, and not as Executor (u). But Lord Camden, in a Case, in which all the doctrine was sifted, after quoting the case of *Lewin v. Oakley* (x), observed, "And now, I think the old Rule is overthrown, and that wherever the Land itself is devised to the same persons who are Executors, the Assets will be equitable. And I hold the case to be the same whenever the Land is devised to them, or to *them and their Heirs*, for in both cases they are equitable Trustees (y). The descent is broke, and the specialty Creditors have lost their Fund. And I can hardly now suggest a case where the Assets would be *legal*, but where the Executor has a naked power to sell *qua* Executor" (z).

*607] *If one by Will directs his Executor to sell his Lands, and dies, and that Executor makes an Executor, the Executor of the Executor cannot sell; because the first Executor had that power as an authority several from his Executorship; and though the first had refused to act as Executor, he might yet have sold

(r) See *Lloyd v. Jones*, 9 Ves. 65, 6, and *Holme v. Stanley*, 3 Ves. 2; and see there, the observation on the Stamp Duty; see also *Curtis v. Price*, 12 Ves. 105.

(s) *Edwards and Graves*, Hob. 265. *Alexander v. Lady Gresham*, 1 Lev. 224. *Dethick v. Carravan*, 1 Lev. 224. 1 Roll. Abr. 920. G. 6. *Boswell v. Corant*, Hard. 405.

(t) *Graves and Powel*, 2 Vern. 248.

Anon. 2 Vern. 405; see *Clutterbuck v. Smith*, Prec. Ch. 127. *Blatch v. Wilder*, 1 Atk. 410.

(u) *Anonymous*, 2 Vern. 133.

(x) 2 Atkyns, 50.

(y) See to same effect, *Buckley v. Williams*, 1 Dick. 337.

(z) *Silk v. Prime*, mentioned in note to *Newton and Bennett*, 1 Bro. C. C. 138; and see *Prowse v. Abingdon*, 1 Atk. 484.

(1) Where the real estate is charged with the payment of debts and legacies, or the deficiency of personal estate, and the insufficiency of the personal estate for this purpose, being admitted by the executor, the court ordered that a master in chancery first ascertain and report whether all the assets had been duly administered, before recourse should be had to the land, or deciding whether the devisees in remainder were to be made parties to a bill filed by the executors of a legatee. *Arden v. Arden*, 1 Johns. Ch. Rep. 313.

the Land. And if the Testator had willed that the Chief Justice should sell his Land, though he resigned his office, and another Chief Justice was placed therein, yet the first should sell the Land, and if he died, his Heir could not sell it, the Trust being determined (a).

Some Judges appear to have been of opinion, that if the Testator devises his Lands to his Heir at Law, for the payment of Debts, and it is the same Estate he would have taken by Descent, he takes the Land by Descent, and it will not be *equitable Assets* (b); but it has been decided, that a mere charge, though it does not break the Descent, makes equitable Assets (c). And where an Estate charged with the payment of Debts is devised to a Stranger, the Estate is *equitable Assets* (d).

If a *cestui que Trust* of a real Estate creates a Mortgage upon it in Fee, and devises the Equity of Redemption to his Son and his Heirs, subject to the payment of Debts, and dies indebted by Bond and Simple Contract, this being a Mortgage of the whole Inheritance, and nothing remaining in the Mortgagor, the [*608 Bond Creditor has no preference, but must be paid *pari passu* with the other Creditors (e).

It has been held that, "Where there is a general power given or reserved to a Person, for such uses, intents, and purposes, as he shall appoint by Will, or otherwise, this makes it his absolute Estate, and gives him such a dominion over it as will subject it to his debts" (f); but no such general proposition was necessary to the decision in that case, nor is it considered as correct. Without an appointment Creditors can have no claim (g). A Power, therefore, to charge an Estate with a Sum of Money, unless executed, is not Assets for the payment of debts (h); for though Equity will aid a defective execution of a Power, yet the want of execution, generally speaking, is, as observed elsewhere (i), never supplied. It has also been noticed (k), that if there be an attempt to execute a Power in favour of Creditors, but the execution is defective, the defect may be supplied; and if a Power be formally executed, but in favour of a Volunteer the Court will take the subject from that person, and give it to the Creditors of him who had the Power (l). But although Creditors in these

(a) Elms. Obs. 95. Grounds and Rudiments, p. 341.

(b) Plunket v. Pierson, 2 Atk. 90, and Degg v. Degg, 3 P. Wms. in note 2.

(c) See Bayley v. Elkins, 7 Ves. 319. Shiphard v. Lutwidge, 8 Ves. 28. Hargrave v. Tindall, 1 Bro. C. C. Batson v. Lindegreen, 2 Bro. 94.

(d) Plunket v. Pierson, 2 Atk. 293.

(e) Plunket v. Pierson, 2 Atk. 290.

(f) Bainton v. Ward, 3 Atk. 172.

(g) See Holmes v. Coghill, 7 Ves. 499. & B. O. on Appeal, 13 Ves.

(h) Lord Cornwallis's case, 2 Freem. 279. Harington v. Harte, 1 Cox. 131.

(i) Ante, p. 55.

(k) Ante, p. 57.

(l) Lord Cornwallis's case, 2 Freem. 279. George v. Millbank, 9 Ves. 190; and see what is said in Holmes and Coghill, 7 Ves. 499; and in Hinton v. Toye, 1 Atk. 465. Bainton v. Ward, 3 Atk. 172, and Pack v. Bathurst, 3 Atk. 269.

*609] cases prevail over Volunteers, yet if a person taking *under a voluntary appointment, sells to another for a valuable consideration, such Purchaser will be preferred to the Creditors (m).

If the Vendor of an Estate reserves the Purchase Money, payable as he shall appoint by an Instrument, executed in a particular manner, and afterwards exercises his power, the Money will, as between his Creditors and Appointees, be considered as Assets (n).

Where Lands are devised *generally* for the payment of Debts, the Vendee of the Estate need not see to the application of the Purchase-Money, but the Trustee only; (1) *but if it be for the payment of any particular Debts, or for the payment of Debts in a Schedule annexed*, the Vendee (unless the Will directs that the Receipts of the Trustees shall be sufficient discharges for the Purchase-Money) is obliged to see to the application of it (o); and that, although the Estate be sold under a Decree (p), or in pursuance of an Act of Parliament (q). If a devise be of Lands for the payment of Legacies only, the Vendee must see to the discharge of the Legacies (r); but if the devise of the Lands be for the Payment of Debts generally, and of Legacies, the Purchaser is not bound to see the Debts or Legacies paid; if he *610] were liable in such case to see the Legacies paid, *that would make it necessary for him to see if the Debts were paid, as they must first be discharged (s).

According to several Cases, an *Equity of Redemption of Freehold* (t), or of *Leasehold* (u) Estates, is an equitable Interest, and is *equitable Assets*; but other cases have determined that *Chattels*, whether real or personal, mortgaged or pledged by the Testator, and redeemed by the Executor, shall be Assets at Law, in the hands of the Executor, for so much as they are worth be-

(m) *George v. Milbanks*, 9 Ves. 190; see *Daubeny v. Cockburn*, 1 Meriv. 638.

(n) *Sugd. Vend. and Purch.* 144. 4th edition. *Thomson v. Towne*, 2 Vern. 319, 416.

(o) *Lex Prætoria*, MS. *Tompkins v. Tompkins*, Gilb. Eq. Rep. 90. *Williamson v. Clerk*, 3 Bro. C. C. 96. *Hardwicke v. Mynd*, 1 Anstr. 109.

(p) *Lloyd v. Baldwin*, 1 Ves. 173; and see *Binks v. Lord Rokeby*, 2 Madd. Rep. 227.

(q) *Cotterell v. Hampson*, 2 Vern. 5.

(r) *Lex Prætoria*, MS. *Sugd. Vend. and Purch.* 436. 5th Edit.

(s) See *Sugd. Vend. & Purch.* 437, who cites *Jebb v. Abbott*, and *Benyon and Collins*, Butl. n. (1) to Co. Litt. 290b. s. 12. and *Rogers v. Skillcorne*, Ambl. 188.

(t) *Solley v. Gower*, 2 Vern. 61. *Ryall v. Ryall*, 1 Atk. 60. *Plunket v. Penson*, 2 Atk. 294. In *Plunket v. Kirk*, 1 Vern. 411, the point was left undetermined.

(u) *Hartwell against Chitters*, Ambl. 308. *Scott v. Scholey*, 8 East. 465. *Sir Charles Cox's Case*, 3 P. Wms. 341, overruling doubts in *Cole v. Warden*, 1 Vern. 410; and see *Lyster v. Bolland*, 3 Bro. 481. S. C. 1 Ves. jun. 431.

(1) Where a guardian sells the estate of his ward, the purchaser is not responsible for the faithful application of the purchase money, unless he knew, or had sufficient reason to believe, at the time that the guardian contemplated a breach of trust. *Feld v. Schieffelin*, 7 Johns. Ch. Rep. 150.

A mere act of sale of assets by an executor, will indemnify the purchaser, as it

yond the sum paid for their Redemption, though recoverable only in Equity (x). (1)

Where a Man takes an Assignment of a Term in a Trustee's name, and the Inheritance in his own name, so that by construction of Equity the Term is attendant upon the Inheritance, such Term, in Equity, has been considered as personal Assets, just as a Term taken in his own name is Assets at Law, but with this difference, that the Heir has the benefit of the Surplus of the Trust of a Term, and not the Executor, after Debts paid: but if a Term be expressly declared by Deed, to be attendant on the Inheritance, such Term will not be considered as personal Assets in Equity (y). It seems, however, that the same Rule *prevails whether the Term be attendant by express de- [*611
claration or not (z). In both cases it is real Assets.

Creditors are paid Interest according to the nature of their Debts.

In several cases, it has been holden, that upon a Devise of Lands for payment of Debts, simple Contract Creditors were entitled to Interest (a); but *Lord Hardwicke* decided to the contrary (b), and such is now the established Rule of the Court (c).

Nothing but what arises from a Contract, Agreement, or demand of a Debt, can give rise to a claim of Interest, and this Court, in these cases, follows a Court of Law (d). Simple contract Creditors are not allowed Interest, though a Trust out of real Estate be created for the payment of Debts and Legacies, and even of the Interest of Debts (e), in aid of the personal Estate.

If an Account be *stated* by the Parties, it carries Interest from the time of stating it (f); but the balance of a mutual Account does not carry Interest (g): and if an Account is decreed, the balance carries no Interest until the Master's Report is confirmed.

Debts carrying Interest in their own nature have Interest calculated upon them in the Master's office, but Debts not carrying

(x) See 3 P. Wms. 344. n. 2, and the Cases there cited, and *Sharpe v. Earl of Scarborough*, 4 Ves. 534.

(y) *Chapman v. Bond*, 1 Vern. 198; and see *Hardres*, p. 489, and the dictum noticed in *Ratcliffe v. Graves*, 2 Chan. Cas. 152, but there said to be contrary to former Resolutions.

(z) *Sugd. Vend. & Purch.* 387, 5th edit. and the cases there cited.

(a) 1 P. Wms. 229, 334, and 2 P. Wms. 26.

(b) *Lloyd v. Williams*, 2 Atk. 109. *Barwell v. Parker*, 2 Ves. 364, 567.

(c) *Chapman v. Ansell*, MS.

(d) *Boddam v. Ryley*, 1 Bro. C. C. 239; and see 5 Ves. 801.

(e) *Tait v. Lord Northwick*, 4 Ves. 816.

(f) 2 Ves. 365.

(g) *Vid.* 2 Eq. Abr. p. 8, in marg. *Earl of Bath v. Earl of Bradford*, 9 Ves. 588, overruling *Maxwell v. Wottenhall*, 2 P. Wms. 26.

regards the application of the purchase money, if there be no collusion. And it will make no difference, where the purchaser knew, that the property sold was a part of the assets. *Sutherland v. Brush*, 7 Johns. Ch. Rep. 17.

(1) *Vide Mores v. Mergatroyd*, 1 Johns. Ch. Rep. 119.

Interest have not; and when subsequent Interest is calculated, *612] it is only upon the *Debts upon which Interest had been calculated before the Report, and no Interest is given upon the Debts, which upon the Report do not carry Interest (i). This has the appearance of hardship, but the policy of the doctrine seems to be, to prevent those who ought to be most active in prosecuting a Decree from becoming negligent in expectation of Interest (k).

Interest is not given from the confirmation of the Report upon demands liquidated by it, but not bearing Interest in their nature, as Legacies and Arrears of Annuities (l); but on further directions, it seems, the Court sometimes gives Interest on demands not carrying Interest in their nature: as where Interest was not given by the Decree, because the circumstances which made it proper could not appear till the Report (m); or where there has been gross and wilful misconduct subsequent to a decree on order for payment, by delay in the execution of it (n); but the single circumstance that the demand is liquidated by the Report, or any delay that might have been prevented by the diligence of the Party claiming Interest, or which is the necessary consequence of the nature of the Jurisdiction, is not considered as a sufficient ground to charge the other Party with Interest (o).

*613] *As simple Contract Debts do not carry Interest, so neither do arrears of a Jointure, nor the arrears of an Annuity or Rent-charge (p), unless where the sum is certain and fixed; and there is either a clause of re-entry, or some penalty upon the Grantor (q), and Creditors will not by such allowance lose their Debts (r). But though Interest is not, in general, given upon the Arrears of a Jointure (s), it has been given to a Jointress, where there has been a long and obstinate delay of payment, and frequent demands of the Money (t).

Bail in Error, who had been obliged to pay a Bond on which an Action was brought against the deceased, and Costs, are not to be considered as specialty Creditors, but only as simple contract Creditors (u).

(i) Creuze against Lowth, 4 Bro. C. C. 318. S. C. 2 Cox, 242, overruling a contrary doctrine determined in the same case, 4 Bro. C. C. 157. S. C. better reported 2 Ves. jun. 157; and see 1 Bro. C. C. 43.

(k) See what is said in Anderson v. Dwyer, 1 Sch. & Lefr. 301.

(l) Creuze v. Hunter, 2 Ves. jun. 157. Sed. vid. as to annuities. The Drapers Company v. Davis, 2 Atk. 211; and Ferrers v. Ferrers, For. p. 2.

(m) See Margerum and Sandford, mentioned 2 Ves. jun. 162.

(n) See Bickham v. Gross, 2 Ves. 471. Sammes v. Rickman, 2 Ves. jun.

36. Tow v. Lord Winterton, 1 Ves. jun. 452.

(o) See Mr. Vesey's note to Creuze and Hunter, 2 Ves. jun. 169.

(p) Vid Cases cited in Creuze and Lowth, 4 Bro. C. C. 318; and see Countess of Ferrers v. Earl Ferrers, For. 3, and Anderson and Dwyer, 1 Sch. & Lefr. 301.

(q) For. 3.

(r) Morris v. Dillingham, 2 Ves. 170.

(s) Anon. 662.

(t) Stapleton v. Conway, 1 Ves. 428.

(u) Goodman v. Parcell, 2 Anst. 548.

The Master, in computing Interest on a Bond, is not to go beyond the penalty (x), except under special circumstances (y); as where a Party is by Injunction prevented from recovering his Debt at Law; or where an *elegit* Creditor is brought into this Court for an Account; or where a judgment Creditor is a Trustee in Possession under the Will of his Debtor, and applies all the Rents in discharge of other Debts, not having retained any part for his own (z).

*If there be personal Assets sufficient to pay a judgment Creditor, he must be paid, and in preference to bond Creditors, but if he proceeds against the Heir, he can only obtain half of the real Assets descended; so that with regard to real Estates he is not in so good a condition as a bond Creditor, for all the real Assets are liable to his Debt (a).

Where there is a Bond and Judgment assigned, Interest is calculated to the date of the Report, but not so as to exceed the penalty (b). Where, however, there is a Bond, and also a Mortgage by way of additional security, if the Creditor resorts only to the Bond, he will not be allowed Interest beyond the amount of the penalty of the Bond (c); but if he claims in respect of his Mortgage, he is entitled to his Debt and whatever Interest may have accrued (d).

Interest is not allowed on the arrears of an Annuity secured by Bond, though it was given in bar of Dower (e).

Upon a deficiency of Assets, the Court sets a value on the Annuity at the time of the death, and the Annuitant can claim only in respect of that; but if there is no deficiency of Assets, the Creditor takes the Annuity as is best for the Annuitant (f).

Interest is allowed on a written Agreement to pay by Installments (g), and also on all Debts that in their nature carry Interest, as notes payable at a *day certain*, *or on demand, [*615 and demand made (h); but it is not allowed upon notes payable at a day uncertain, or upon shop Debts (i); but the Court in the Administration of Assets follow the Law; and if Interest would be given at Law in the shape of Damages, the Party claiming

(x) *Tew v. Earl of Winterton*, 3 Bro. 489, and S. C. 1 Ves. jun. 451. *Knight and Maclein*, 3 Bro. 498. *Macworth v. Thomas*, 5 Ves. 331. *Clarke v. Lord Abingdon*, 17 Ves. 106. See *Wilde v. Clarkson*, 6 T. R. 303, which overruled *Lord Lonsdale v. Church*, 2 T. R. 388.

(y) See *Clarke v. Seton*, 9 Ves. 411.

(z) *Atkinson v. Atkinson*, 1 Ball and Beatty, 339.

(a) See *Stileman v. Ashdown*, 2 Atk. 608. *Ambl.* 13.

(b) *Sharpe v. Earl Scarborough*, 3 Ves. 557.

(c) *Clarke v. Lord Abingdon*, 17 Ves. 106.

(d) *Ibid.*

(e) *Tew v. Lord Winterton*, 1 Ves. 451. S. C. 3 Bro. C. C. 489.

(f) *Francis v. Cooper*, 4 Ves. 763.

(g) *Parker v. Hutchinson*, 3 Ves. 133.

(h) *Upton v. Lord Ferrers*, 5 Ves. 801; and see *Lowndes v. Collins*, 17 Ves. 27. *Lithgow v. Lyon*, Coop. 29; but see contra, *Rigby v. Macnamara*, 2 Cox, 420.

(i) *Parker v. Hutchinson*, 3 Ves. 135.

against the Assets in Equity is allowed the sum which he would have recovered at Law (*k*).

Interest is not allowed on a Judgment in respect of Assets, *quando acciderint* (*l*).

It is a rule, (and as we have seen (*m*), not confined to cases merely of Assets,) that if a Party has two funds liable to his claim, a Person having an Interest in one only, has a right in Equity to compel the former to resort to the other, if that is necessary for the satisfaction of both (*n*).

This rule has given rise to what in the Administration of Assets is termed *Marshalling of Assets*.

Marshalling of Assets respects two different Funds, and two different sets of Parties, where one set can resort to either Fund, the other only to one: and it is grounded on obvious equity; it does no prejudice to any body, and it effectuates the Testator's intent (*o*). It takes place in favour of simple contract *616] *Creditors (*n*), and of Legatees, Devisees (*o*), and Heirs, and in a few other cases; but not in favour of next of kin (*p*); and the rules of the Court, in this respect, have been considered to be of great consequence to the Practice of the Court (*q*), and as useful a power as any the Court possesses; for where there are Creditors, and Legacies to Children for their Portions, if the Law was to have its full force, (though the reason of it was good when it was originally framed) and the Creditors were to exhaust the personal Estate, it would be the ruin of Families (*r*). The Court, therefore, leans and endeavours to Bring Creditors within the rule as to the marshalling of Assets (*s*).

If a Bill is filed for the Administration of Assets, and the Court sees at any period of the Suit that Creditors by simple contract will be deprived of their Debts, by specialty Creditors going against their Fund, the Court will of itself, though the Bill is not framed with that view, direct the Assets to be marshalled. If, for instance, it appear for the first time, by the Master's *Report*, that a specialty Creditor was paid out of the personal Estate, it is not necessary to file another Bill, for the purpose of marshalling the Assets (*t*).

The Cases in which a Court of Equity marshals real and per- *617] sonal Assets for the payment of simple contract *Debts

(*k*) See *Dornford v. Dornford*, 12 Ves. 129. *Contra Rigby v. Macnamara*, 2 Cox, 420.

(*l*) *Deschamps v. Vanneck*, 2 Ves. 716.

(*m*) Ante, p. 250, &c.

(*n*) *Attorney-General v. Tyndall*, Amb. 391. *Aldrich v. Cooper*, 8 Ves. 389. *Trimmer v. Bayne*, 9 Ves. 209.

(*o*) *Attorney-General v. Tyndall*, 2 Eden, 211.

(*n*) *Feverstone v. Seetle*, 3 Salk. 83.

(*o*) *Chitty against Parker and others*, 4 Bro. C. C. 411.

(*p*) 1 P. Wms. 680.

(*q*) *Galton v. Hancock*, 2 Atk. 438.

(*r*) See *Hanby against Roberts*, Amb. 128.

(*s*) *Lacon v. Mertins*, 1 Ves. 312.

(*t*) *Gibbs v. Ougier*, 12 Ves. 416.

and Legacies, may be generally stated thus:—1. Where there are specialty and simple contract Debts, and Legacies, and Lands left to *descend*. In this case, if the specialty Creditors take a satisfaction for their Debts out of the personal Estate, the simple contract Creditors first, and then the Legatees, shall stand in the place of the specialty Creditors, for obtaining a satisfaction out of the Lands, to the amount of so much as was received by the specialty Creditors out of the personal Estate. 2. Where there are specialty and simple contract Debts, and *Lands specifically devised*. In this case, if the Creditors take a satisfaction for their Debts out of the personal Estate, the simple contract Creditors shall stand in the place of the specialty Creditors for obtaining a satisfaction out of the Lands to the amount of so much as was received by the specialty Creditors out of the personal Estate, but then there can be no relief for the Legatees, because there is as much Equity to support the specific Devise of the Lands, as to support the Bequest of the Legatees. 3. Where the Debts are charged upon the Lands. Here the Legatees shall have the personal Estate towards their satisfaction, and if the Creditors take it in or towards the discharge of their Debts, the Legatees shall stand in their place *pro tanto* to have a Discharge out of the Lands. 4. Where simple contract Debts and Legacies are both charged on the Lands. In this case the Lands shall be sold, and all paid equally (u).

Such appear to be the general rules as to the marshalling of Assets, and what follows may be *considered by way of [*618 illustrating these rules by a reference to the decisions on the subject.

Where Debts by *Specialty*, which are a Lien at Law on the real Estate, are discharged out of the personal Assets by Executors, in case of the Lands, the Creditors by simple Contract are entitled to stand *pro tanto*, in the place of the Creditors by Specialty (x), and to have their Debts satisfied out of the Lands, and the Court will decree them to be sold for that purpose (y). If a Mortgagee of Freehold and Copyhold Estates, who is also a specialty Creditor, exhausts the personal Assets, the simple contract Creditors are entitled to stand in his place, *pro tanto*, against both the Freehold and Copyhold Estates (z). Upon the same principle, the benefit of the *Vendor's Lien* on the Estate for the Purchase Money, may, it seems, be marshalled (a).

(u) Per. Sir Thomas Clarke, M. R. in *Davenport v. Fletcher*, 18th November 1784, MS.

(x) *Fenhoulet v. Passavant*, 1 Dick. 253. *Ex parte Hodgson*, 2 Dick. 737.

(y) See *Charles v. Andrews*, 2 Mod. 151, 3.

(z) *Aldrich v. Cooper*, 8 Ves.

382. The case of *Robinson v. Tonge*, respecting Copyholds, mentioned 1 P. Wms. 680, in note, was in this case overruled. *Robinson v. Gee*, 1 Ves. 252; and see *Waring and Ward*, 7 Ves. 836. *Bell v. Phyne*, 7 Ves. 480.

(a) *Trimmer v. Bayne*, 9 Ves. 209; and see *Austin v. Halsey*, 6 Ves. 475.

If there be a Debt owing to the King, the Court will direct *619] the King's Debt to be satisfied out of the *real Estate, that the other Creditors may be let in to have a satisfaction of their Debts out of the personal Assets (b).

It has been held, that Assets could not be marshalled for the payment of Legacies (c); but this doctrine was contrary to earlier Cases (d), and has been overruled (e); and now it is, with some exceptions, a rule, that they have a right to marshal as against *Estates descended*, but not as against *Estates devised* (f), unless the Lands devised be expressly subjected to Debts (g), or are liable to a *Mortgage* (h).

If one, seised in fee, owes Debts by Bond, and Devises his Land to his Heir in Tail, and gives several Legacies, and afterwards dies leaving the Heir his Executor, and the Heir with the personal Estate pays off the Bond Debts, by which means there are not Assets to pay the Legacies, the Legatees are without remedy, the Land being devised in Tail to the Heir. It had been otherwise if the Land descended to the Heir in Fee (i).

If a Testator gives by his Will a Lease, a Horse, or any other *620] specific Legacy, and leaves a Debt by *Mortgage or Bond, in which the Heir is bound, the Heir cannot compel the specific Legatee to part with his Legacy in ease of the real Estate; and though the Creditor may subject this specific Legacy to his Debt, yet the specific Legatee will in Equity stand in his place (l), and the same rule applies to *pecuniary* Legatees (m).

If, for instance, a Testator owes a Debt for which his real and Leasehold Estates are mortgaged, Equity will charge the Debt on the real Estate, in order to enlarge the Fund for the payment of the Legacies as well as Debts (n).

Where one by Will gave several Legacies, some charged on the real Estate, and others not, it was held, that if the personal

Macreth v. Symonds, 15 Ves. 338. S. C. MS. and see also *Hendley v. Readhead* and others, Coop. 50. *Pollexfen and Moore*, 3 Atk. 272, a seeming authority in favour of Marshalling, appears not to be so, when corrected by the Registrar's Book, see Sugd. Vend. and Purch. 468, 5th edit. see also as to that case *Blackburn and Gregdon*, 1 Bro. 424. *Charles and Andrews*, 2 Mod. 151, 3, and *Coppin v. Coppin*, 2 P. Wms. 291. S. C. Select Cas. in Ch. 28, seem to be Authorities against the Marshalling; and see Sugd. Vend. & Purch. 467, &c. 5th edit.

(b) *Sagittary v. Hyde*, 1 Vern. 455.

(c) *Lex Præst.* 308. *Kneeling v. Browne*, 5 Ves. 362; and see the reasoning in *Kightly v. Kightly*, 2 Ves. jun. 328.

(d) See 2 Chan. Rep. p. 4, 117. 3

Chan. Rep. 83.

(e) *Masters v. Masters*, 1 P. Wms. 421. *Williams v. Chitty*, 3 Ves. 551. *Norman v. Morrell*, 4 Ves. 769. *Bonner v. Bonner*, 13 Ves. 379.

(f) 2 Salk. 416.

(g) *Hearne v. Meyrick*, 1 P. Wms. 201. S. C. 2 Salk. 416.

(h) *Lutkins v. Leigh*, For. 54. S. C. MS.

(i) See *Lloyd v. Williams*, 2 Atk. 110. *Clifton v. Burt*, 1 P. Wms. 679. *Hanby against Roberts*, Ambl. 129. *Haslewood and Pope*, 3 P. Wms. 324.

(l) *Tipping v. Tipping*, 1 P. Wms. 729; and see *Burton v. Pierpont*, 2 P. Wms. 81.

(m) See *ibid.* and see *Davis v. Gardiner*, 2 P. Wms. 190.

(n) *Davis v. Gardiner*, 2 P. Wms. 190.

Estate proved insufficient to pay all the Legacies, the Legacies charged on the real Estate should be paid out of the same ; or if they had been paid out of the personal Estate, the other Legatees, as to so much, should stand in their place upon the Land (o).

And where a Testator gave some Legacies by *Will*, and others by a *Codicil*, and the Lands were charged with the Legacies in the Will, but not with the Legacies in the Codicil, and the personal Estate was not sufficient to pay all the Legacies, the Assets were marshalled, and the Legatees in the Will were ordered to be paid out of the *real Estate*, and if that was deficient, they were, as to the surplus, to come *in average with the Le- [*621 gatees in the Codicil, to be paid out of the personal Estate (p).

The Court will not marshal Assets to pay Charity Legacies (q), for by that means the Statute of Mortmain (r) would be eluded (s).

Where there was a Bequest of the remainder of the Testator's Effects, Annuities, Mortgages, &c. to a Charity, it was held, the Devise of the Mortgages was void, but being part of the enumerated Residue, the Court ordered them to be applied first in payment of Debts, before any other part of the personal Estate, to have a larger fund for the Charity (t) ; this being said to be, not marshalling Assets, but *arranging* the different species of personal Estate (u) ! This, however, is a doctrine which has not been followed (x).

If a Legacy be charged on the real and personal Estate of the Testator, the personal Estate must be *first applied ; but [*622 if the Legacy be expressly given out of the real Estate, such Estate must bear the burthen of it, and the personal is not applicable in aid (y).

If one devises his real Estate, and gives pecuniary or specific Legacies not charged on that real Estate, and dies, leaving spe-

(o) *Bligh v. Earl Darnley*, 2 P. Wms. 619.

(p) *Bonner v. Bonner*, 13 Ves. 385 ; and see *Masters v. Masters*, 1 P. Wms. 422 ; and a case of this kind, *Hanby and Roberts*, Ambl. 127.

(q) *Foster against Blagden*, Ambl. 707. *Hillyard v. Taylor*, Ambl. 714. *Mogg v. Hodges*, 2 Ves. 52. S. C. 1 Cox, 9. *Makeham v. Hooper*, 4 Bro. C. C. 153. *Waller v. Childs*, Ambl. 524 ; and see *Attorney-General v. Tyndal*, cited *ibid.* p. 526, and reported *ibid.* p. 615. S. C. 2 Eden, 207 ; and also very full in *Highmore on Mortmain*, 106. *Foy v. Foy*, Cox, 165. *Sed vid. Arnold v. Chapman*, 1 Ves. 110. *Attorney-General v. Greaves*, Ambl. 158, and *Attorney-General and Tomkyns*, Ambl.

217. *Attorney-General v. Lord Mountnorris*, 1 Dick. 379. *Ridges v. Morrison*, 1 Cox, 130, and *Coleman v. Taylor*, there cited by the Master of the Rolls.

(r) 9 Geo. 2. c. 96.

(s) *Attorney-General against Tyndall*, Ambl. 615.

(t) *Attorney-General against Caldwell*, Ambl. 636 ; and see *Attorney-General v. Greaves*, Ambl. 155.

(u) *Ibid.* Reporter's note, p. 636.

(x) *Attorney-General v. Hirst*, 2 Cox, 364. *Middleton v. Spicer*, 1 Bro. C. C. 155. *Attorney-General v. Earl of Winchelsea*, 3 Bro. C. C. 373. *Makeham v. Hooper*, 4 Bro. C. 153.

(y) *Amesbury v. Brown*, 1 Ves. 477.

cialty Debts, and the specialty Creditors exhaust the personal Estate, the Legatees are not allowed to stand in their place and come upon the Realty, because it is supposed as much to be the intention of the Testator that the Devisee should have the real Estate, as that the Legatees should be paid (z). So, if one has only personal Estate, and gives specific as well as general Legacies, if the Creditors exhaust the general Assets, yet the general Legatees shall not stand in their place and come upon the specific Legatees (a). But if one having Land and personal Estate makes his Will, being indebted by Specialty, and gives specific Legacies, and then gives the *rest and residue* of this real and personal Estate; if the Creditors exhaust the Personality, the Legatees may stand in the place and come upon the residuary Legatee, because he has only the *rest and residue* (b).

Legatees are entitled to stand in the place of Mortgagees (c). *623] If the personal Estate be insufficient *to pay all the Legacies, the Heir or Devisee of the real Estate would not be entitled to have real Encumbrances paid out of the personal Estate, to the disappointment of general pecuniary Legatees (d).

The Rule of the Court as to marshalling Assets applies only as between the real and personal Assets of a person deceased; for the Court has no right to marshal the Assets of a person alive, they not being subject to such a Jurisdiction of Equity till his death. Nor can the Court extend his relief to Creditors farther than the nature of the Contract will support it, therefore it must be a specialty Creditor of the person whose Assets are in question, and such as might have a remedy against both the real and personal Estate, or either, of the Debtor deceased; it not being every specialty Creditor, in whose place the simple Contract Creditors can come, to affect the real Assets, viz. where the specialty Creditor himself cannot affect the Assets, as where the Heirs are not bound (e).

A Recital of a Debt in a Deed does not make it a specialty Debt (f).

Where the Assets are partly legal and partly equitable, though Equity cannot take away the legal preference on legal Assets, yet if one Creditor has been partly paid out of such legal Assets, when satisfaction comes to be made out of Equitable Assets, the *624] Court will postpone him until there is an equality *in satisfaction to all the other Creditors out of the equitable Assets,

(z) *Hazlewood v. Pope*, 3 P. Wms. 383. *Hanby against Roberts*, Ambl. 128. S. C. 1 Dick. 104, under name of *Hamley and Fisher*; *Forrester against Lord Leigh*, Ambl. 173.

(a) Ambl. 128; and see *Forrester v. Leigh*, Ambl. 173.

(b) *Hanby against Roberts*, Ambl. 128, 9, S. C. 1 Dick. 104, under

name of *Hamley v. Fisher*; and see 1 Ves. 152.

(c) *Forrester v. Leigh*, Ambl. 173.

(d) 1 Roper on Legacies, 470, who cites *Lucy v. Gardiner*, Bunb. 137. *Lutkins v. Leigh*. For. 53, &c.

(e) *Lacon v. Martin*, 1 Ves. 312.

(f) 1 Ves. 313.

proportionable to so much as the legal Creditor has been satisfied out of the legal Assets (g).

A Devisee of a mortgaged Estate has, on a deficiency of the personal Estate, a right to have the devised Estate exonerated out of real Assets descended on the Heir (h). And though the personal Estate is by the Testator exempted from the Debts, and a mortgaged Estate is devised, subject to the Encumbrances upon it, a descended Estate is nevertheless liable to the payment of such Encumbrances (i).

It seems, that if the Testator devises his Estate to his Heir at Law, though the Devise is void as to the purpose of making the Heir take otherwise than by descent, yet it is held to show the Testator's Intent that the Heir should have that Land, and therefore the Land must be applied only as other devised Land would (k).

So if the Heir or Devisee of the Real Estate (for the Rule applies to an *Hæres factus*, as well as to an *Hæres natus* (l), is sued by a Bond Creditor, he may stand in the place of that Creditor to be reimbursed out of the personal Estate (m).

But the Equity to have Real Estate enonerated by Personal, subsists only between the Heir or Devisee *and the Resi- [*625
duary Legatee, and not against specific or general Legatees, much less Creditors (n).

If one mortgages his Fee-simple Estate, and devises his Leasehold to A. and his Fee-simple to B. and dies, leaving no Personal Estate, the Devisee must take it *cum onere*, and cannot charge the Leasehold Estate specifically devised, with the Mortgage (o).

Bona Paraphernalia (unless purchased out of the Wife's separate Estate) (p), are liable for Debts on a deficiency of Assets (q); but not in favour of an Heir; or of Legatees (r).

A Widow, in respect of her *Paraphernalia*, has a claim to marshal the Assets as against real Estates descended (s), but not against real Assets devised (t); but a real Estate charged with

(g) *Morris v. Bank of England*, For. S. C. MS. 220.

(h) *Galton v. Hancock*, 2 Atk. 204, 430.

(i) *Barnewell v. Lord Cawdor*, 3 Madd. Rep. 453.

(k) See note A. to *Chaplin v. Chaplin*, 3 P. Wms. 368.

(l) *Pockley v. Pockley*, 1 Vern. 37. *Forrester v. Lord Leigh*, Amb. 173.

(m) *Mogg v. Hodges*, 2 Ves. 53.

(n) *Hamilton v. Worley*, 2 Ves. jun. 65. *Hawes v. Warner*, 2 Vern. 477. S. C. 3 Ch. Rep. 206.

(o) *Oneal v. Mead*, 1 P. Wms. 693; and see *Lutkins v. Leigh*, *Forrester*, 53.

S. C. MS.

(p) *Wilson v. Pack*, Prec. Ch. 295. 1 Freem. 304.

(q) *Ridout v. Earl of Plymouth*, 2 Atk. 104. See *Lady Tyrell's Case*, 2 Eq. Abr. 155. *Burton v. Pierpont*, 2 P. Wms. 79.

(r) *Tipping v. Tipping*, 1 Peer Wms. 730. *Snelson v. Corbett*, 3 Atk. 369.

(s) *Probert v. Morgan*, 1 Atk. 441. *Snelson v. Corbet*, 3 Atk. 369. See vid. *Incedon v. Northeote*, 3 Atk. 438.

(t) See *Probert v. Clifford*, mentioned in note 1 to 2 P. Wms. 544. S. C. Amb. 6.

the payment of Debts in aid of the personal Estate must be applied before the Widow's Paraphernalia (*u*). If, however, for want of Assets, *bona paraphernalia* are applied in payment of the Debts of the Husband, and contingent Assets afterwards fall in, they are not applicable to pay the produce of the *bona paraphernalia*, as they would of the produce of a *specific Legacy* applied in payment of Debts (*x*).

*626] *The personal Property of an Intestate, wherever situated, must be distributed by the Law of the country where his domicil was (*y*), which is *prima facie* the place of his residence : but that may be rebutted, or supported by circumstances (*z*).

If the Father be dead, the domicil of the Children, it seems, follows that of the Mother (*a*).

It has been more than once observed, that the *Statute of Distributions* (*b*), (drawn it is said, by Sir Walter Walker, a famous Civilian) (*c*), and the *Statute of James the Second* (*d*), are very incorrectly penned (*e*); but the construction of them is settled by Decisions.

Questions as to what is an *Advancement* frequently arise in the distribution of Assets. In our review of this subject we shall first, consider that doctrine in general cases of Intestacy; secondly, as it applies in cases where the Intestate is a *Freeman of London*; and thirdly, where the Intestate is a *Freeman of York*.

1. The *Statute of Distributions* was made to put an end to the contest which had long been between the Temporal and Spiritual Courts (*f*); for then the Spiritual Court ordered any Distribu-
*627] tion, or Bond to be *given by the Administrator for that purpose, the Temporal Court sent a Prohibition, being of opinion that the Administrator had a right to all, and that the Spiritual Court could not break into that right (*g*).

The Statute therefore was passed, and in favour of the practice of the Spiritual Court, which proceeded to order distribution as often as the Common Law Courts did not prohibit them, and the Act intended to make the Children's provision equal, which was agreeable to the Civil Law, where goods moveable and im-

(*u*) *Boynton v. Boynton*, 1 Cox, 186.

(*x*) *Burton v. Pierpoint*, 2 P. Wms. 79.

(*y*) *Pipon v. Pipon*, Ambl. 25. *Burn v. Cole*, Ambl. 415. *Thorne v. Watkins*, 2 Ves. 35. *Sommerville v. Sommerville*, 5 Ves. 750. 2 H. Blac. 406. 2 Burr. 1079.

(*z*) *Bempde v. Johnstone*, 3 Ves. 198.

(*a*) *Pottinger v. Wightman*, 3 Meriv. 67.

(*b*) 22 and 23 Ch. 2. c. 10.

(*c*) *Pett's Case*, 1 P. Wms. 27. Sir

L. Jenkyns appears to have assisted in the framing of this Act. See his Reasons for the passing of the Act, 1 Vol. Life of Sir Leol. Jenkyns, p. 53. and 2 Vol. p. 695.

(*d*) 1 Jac. 2. c. 17.

(*e*) *Stanley v. Stanley*, 1 Atk. 457; and see *Edwards and Freeman*, 2 P. Wms. 444.

(*f*) See an account of this dispute in *Palmer v. Elliot*, 3 Mod. 58. *Carter v. Crawley*, Raym. 496.

(*g*) See *Hughes v. Hughes*, Cart. 125. 1 Lev. 233.

moveable are considered as the same, though our Law would never let the Civil Law meddle with Lands (*h*).

The intention of making the provision of the Children equal runs throughout the whole Act; first, it gives the two thirds of the personal Estate (the mother being allowed her third) equally among all the Children. But then the Act takes it into consideration that there may be some of the Children who have received a portion or advancement before, but not so much as to make up their full share; in that case, such Child so advanced but in part is allowed so much more out of the Intestate's personal Estate as will suffice to make his share equal to that of the other Children. The Statute takes nothing away that has been given to any of the Children, however unequal that may have been. How much soever that may exceed the remainder of the personal Estate left by the Intestate at his death, the Child may, if he pleases, keep it all; if he is not contented, *but [*628 would have more, then he must bring into Hotchpot what he has before received; this manifestly seems to be the intention of the Act, grounded upon the most just rule of Equity, *equality* (*i*). The Act does what a good and just Parent ought for all his Children. It has been called a *Parliamentary Will* (*k*).

By the Statute (22 and 23 Car. 2. c. 10,) it is provided, that no Child of the Intestate, except his Heir at Law, on whom he settled, in his life-time, any Estate in Lands, or pecuniary portion equal to the distributive shares of the other Children, shall participate with them of the Surplus; but if the Estate so given him by way of advancement be not equivalent to their Shares, then that such part of the Surplus as will make it so shall be allotted to him.

Any *Land* provision to the *Heir at Law* of the Intestate, however given, is privileged by the Statute of Distribution, and is not to be brought into Hotchpot (*l*), and where an *Heir* or *Coheir* has a *real* Estate settled by the Father, this will not operate as an *advancement*, even though declared by the Will to be so.

It is however clear, and has been long settled, that the *eldest Son* is to bring into *Hotchpot* any advancement to him of *personal Property* (*m*). An office, though at will, as a *Gentleman Pensioner's* place (*n*), or a *Commission in the Army*, or Money to purchase *a *Commission* (*o*), is an advancement, and so [*629 is an *Annuity* (*p*); and the value of the Annuity is calculated by

(*h*) *Edwards v. Freeman*, 2 P. Wms. 441, 2. 446; and see *Humphrey v. Bullen*, 1 Atk. 459.

(*i*) *Edwards and Freeman*, 2 P. Wms. 443.

(*k*) *Ibid.* 439, 440. 443.

(*l*) *Ibid.* 441.

(*m*) *Fitzg.* 284. Lord Kircud-

bright v. Lady Kircudbright, 8 Ves. 55.

(*n*) *Norton v. Norton*, 3 Ves. 317. in note. *Wycherley v. Wycherley*, 2 Eden, 190.

(*o*) *Hearne v. Barber*, 3 Atk. 213. 3 P. Wms. 317, note (*o*.)

(*p*) *Lord Kircudbright v. Lady Kircudbright*, 8 Ves. 63.

the value at the date of the grant ; or if it has ceased, according to the payments received, at the option of the Child (q).

A provision for a Child by *Will*, (for a Case may happen, that as to part of the personal Estate, the Testator may die intestate) is not an *Advancement* to be brought into Hotchpot ; and by the same Rule, *Land* given by *Will* to a younger Child is not to be brought into Hotchpot.

There are a great variety of Provisions which may be made by Parents for Children ; and it could not be expected the Statute of Distribution should enumerate all of them. A *contingent Provision*, where the contingency has happened, is a Provision, and is within the Act ; and wherever such Provisions are to take effect in a reasonable time, they are considered within the Act. A Child may be provided for by Land, Freehold or Copyhold, or by a Charge upon either, or by Money, Goods, or Stock in Companies. Some Provisions may be payable to the Child when of age, or upon Marriage ; and these contingencies, framed in an infinite variety of ways, as the several circumstances of the parties may require, rendered it impossible for the Act to mention all of them, and therefore it was proper for the Legislature to make use of general Words as they have done (r).

*§30] A Provision made for a Child either by voluntary *Settlement, or for a good consideration, is an advancement *pro tanto* (s).

A rent out of Lands settled upon a younger Child is an advancement *pro tanto* (t). So an *Annuity* given by the Father, to commence after his death, is an Advancement *pro tanto* ; and by the same reason a *Reversion* settled on a Child, or a portion, though payable in *futuro*, is an *Advancement pro tanto*, as it may be valued (u).

Where a Father makes a Provision for his Son on his Marriage, all the limitations in such Settlement to the Wife and Children of such Son are to be considered as parts of that advancement ; and it is not the Child's Estate for life only that is to be valued and brought in (x).

If Money be settled payable on a contingency, to take effect within a reasonable time, it is an advancement *pro tanto*, and it seems that the Court may make a Distribution, and order that if the contingency happens the Money shall be refunded (y).

In these cases of advancement, if the Father dies intestate, the Child is entitled to his *testamentary share*, without bringing into Hotchpot the Money he has received in advancement (z).

(q) Ibid. p. 51.

(r) Edwards v. Freeman, 2 P. Wms. 440.

(s) Edwards v. Freeman, 2 P. Wms. p. 444.

(t) Ibid. 440.

(u) Ibid. 442. 444.

(x) Weyland v. Weyland, 2 Atk. 635.

(y) Edwards v. Freeman, 2 P. Wms. 446. 448.

(z) Hearne v. Barber, 3 Atk. 213. Rich v. Rich, 2 Ch. Ca. 160.

If a Child or Children are *advanced* in the Father's life-time they will be considered as *fully advanced*, unless the *quantum* of the Advancement appears in Writing, under the Father's hand (a). The ground *of which is, partly, on the difficulty of taking an account after such a length of time; but principally because you do not know what to bring into *Hotchpot* (b).

If a Father advances one of his Children in part, and the Child dies, leaving Issue, and then the Father dies Intestate, the Issue of a dead Child claiming a distributive share must bring into Hotchpot what their Father had received (c).

If the Father gives Money to put a Son out Apprentice (d), or Sets him up in a Trade, it is an advancement. So where Money is expressed to be advanced in part of a Fortune, though of small amount, it is an advancement; but if petty sums are given, at different times, by a Father to a Child, and not said to be as a Portion, but by way of present or otherwise, they are not to be brought into Hotchpot (e).

A present of a Gold Watch and Wedding Clothes have been considered as a *personal present*, and not as an advancement (f).

So Alimont (g), Maintenance Money, or an allowance made by a Freeman to his Son at the University or in travelling, is not considered as an advancement (h); *but *Alimony* [*682 paid by a Father to his Child has been considered as an advancement (i).

Money laid out by the Intestate on the Repairs of Houses, which descended to his eldest Son as Heir, is not an advancement to be brought into Hotchpot under the Statute. It would be otherwise if the Houses had been given to the Son in the Father's life-time (k).

Questions of Advancement can arise only *among Children*, and not between an only Child and a Widow (l).

A Child advanced, as well as one not advanced, is entitled to a share upon the death of a Brother or Sister (m).

(a) *Hartey v. Desbouverie*, For. 135; and see 1 Vern. 89. *Hume v. Edwards*, 3 Atk. 451. *Elliot v. Collyer*, ib. 527. *Fawkener v. Watts*, 1 Atk. 406. *Civil v. Rich*, 1 Vern. 216. *Chace v. Box*, Eq. Ca. Abr. 154, 5. where a certificate is given at length of the custom of London, *Cleaver v. Spurling*, 2 P. Wms. 526.

(b) *Elliot v. Collier*, 2 Ves. 16.

(c) *Proud v. Turner*, 2 P. Wms. 560.

(d) *Sed quas.* see *Norton v. Norton*, 3 P. Wms. 317, in note O.

(e) *Morris v. Burroughs*, 1 Atk. 402,

3. *Norton v. Norton*, 3 P. Wms. 317, in note.

(f) *Elliot v. Collier*, 1 Ves. 16. S. C. 3 Atk. 527.

(g) *Edwards v. Freeman*, 2 P. Wms. 436. *Elliot v. Collier*, 1 Ves. 15.

(h) 3 P. Wms. 317, in note.

(i) *Elliot v. Collyer*, 3 Atk. 528.

(k) *Smith v. Smith*, 5 Ves. 721.

(l) *Garon v. Trippet*, Ambl. 190; and see Certificate in *Chase and Box*, Eq. Cas. Abr. 154.

(m) *Hudson v. Hudson*, For. 135. *Cowper v. Scott*, 3 P. Wms. 124.

A Descent of Lands in *Borough English* to the youngest Son will not prevent his having a full distributive share of his Father's personal Estate (n).

2. Questions of *Advancement*, whether they arise on the *Statute of Distributions*, or the *custom of London*, have been frequently said to receive the same determination (o); and, certainly, the Statute was in a great degree founded upon the custom (p). As the custom does not affect a Widow's Estate, or gifts made by her, so neither does the Statute. If the Mother, therefore, being a Widow, advances a Child, and dies Intestate, *633] the Child advanced does not *bring what he received from the Mother into Hotchpot (p).

Any Land of *Inheritance* settled by a Freeman upon his Children (q), or Money given to be laid out in Land (r), is not considered as an Advancement either in part or in the whole, within the *Custom of London*, for the custom affects only the *personal Estate* of the Freeman (s); but if Lands of Inheritance are given to a Child by the Freeman, in bar of the orphanage part, and accepted as such, it will be binding, or at least the Child cannot have both (t).

If a Child claims under the Custom of London he must bring what he has received by way of advancement into the orphanage part; and what he receives as a Legatee must be accounted for to the personal Estate, he not being entitled to take both by the Will and the Custom (u).

Covenants in the Marriage Settlement of a Freeman of the City of London, that the Husband might dispose of the Wife's share by Will, and also that her Executors would release and convey all her Interest, &c. to the husband; was held not to vary the general rule that the Children should be entitled to the benefit of a composition with the Widow (x).

Parol Evidence of a Father's declaration will not be allowed *634] to debar a Child of its orphanage share; *but proofs of declarations by the *Husband* of a Citizen's Daughter, in regard to an advancement in Marriage with such Daughter, may be read. Proofs also of declarations of the Wife, made during the Coverture of her first Husband, may be read against the second (y).

(n) *Lutwyche v. Lutwyche*, For. 276.
Pratt v. Pratt, 2 Str. 935.

(o) *Elliot v. Collier*, 1 Ves. 17.

(p) *Edwards v. Freeman*, 2 P. Wms. 449. *Holt v. Frederick*, 2 P. Wms. 358.

(p) *Holt v. Frederick*, 2 P. Wms. 358.

(q) *Rich v. Rich*, 2 Chan. Cas. 160.

(r) *Annand v. Honeywood*, 1 Vern. 345. S. C. 2 Chan. Cas. 117, and also

p. 129, but not in this latter page as to that point.

(s) 2 P. Wms. 274; and see *Hume v. Edwards*, 3 Atk. 452; and see *Civil v. Rich*, 1 Vern. 181, and *Stanton v. Platt*, 2 Vern. 753.

(t) *Cox v. Belitha*, 2 P. Wms. 274.

(u) *Knipe v. Thornton*, 2 Eden.

(x) *Ibid.* 118.

(y) *Fawkener v. Watts*, 1 Atk. 407.

Grandchildren, it has been held, are not entitled to a customary share of a Freeman's personal Estate by the Custom of London (z).

Where a Citizen has several Children, and some of them are advanced, and some not, and the advanced Children die, and then the Father dies, no consideration is had of the advanced Child, but the Distribution is, as if it had never existed (a).

Sums of Money given by a Freeman to a *Daughter*, if not given as a Marriage Portion, or in pursuance of a Marriage Agreement, are not an Advancement (b).

Presents made by a Freeman to his Child, after frequently living with her for several weeks at a time, have been considered only as a satisfaction for her trouble, and not as a gift to be brought into Hotchpot (c).

Questions relative to the Administration of Estates according to the Custom of *London*, have been much less frequent since the Statute (d), which gives Freemen of the City a power of disposing of their personal *Estate unfettered by custom. If [*635 a Freeman's personal property is disposed of by Will, it goes according to such disposition; but if he dies intestate, wholly or in part, then the customary part of the Property as to which he dies intestate is distributable according to the custom, but the testamentary part is out of the custom, and is distributable according to the Statute of Distributions (f).

And though a Freeman of London leaves the City, and lives in the Country twenty years, marries, and makes his Wife a Jointure, and dies, his Estate is distributable according to the custom, and the Wife is entitled to a Share (g) unless barred by Contract (h).

An *only Child* of a Freeman of *London* advanced in part is not obliged to bring such part in Hotchpot (i).

If a Man marries an Orphan who dies under twenty-one, her orphanage part does not survive to the other Children, but goes to the Husband (k).

A Daughter of a Freeman marrying without her Father's consent loses her orphanage part, unless he is reconciled to her before his death (l).

(z) *Fowke v. Hunt*, 1 Vern. 397.

(a) *Beckford v. Beckford*, 2 Chan. Cas. 119.

(b) *Hume v. Edwards*, 3 Atk. 451. *Elliot and Collier*, 3 Atk. 528, and see the observations of Mr. Vernon, at the end of his Report of *Fowke v. Lewen*, 1 Vern. 90.

(c) *Hume v. Edwards*, 3 Atk. 452; see also *Ambl.* 189.

(d) 11 Geo. 1.

(f) *Stapleton v. Sherard*, 1 Vern. 432.

(g) *Rutter v. Rutter*, 1 Vern. 180. *Webb v. Webb*, 2 Vern. 110.

(h) *Pickering v. Lord Stamford*, 3 Ves. 336.

(i) *Fane v. Bench*, 2 Vern. 234.

(k) *Touke v. Lewen*, 1 Vern. 88.

(l) *Foden v. Howlett*, 1 Vern. 554.

Two Aunts, a Nephew and a Niece, take equally *per capita* (m).

If there be an Uncle, and a deceased Uncle's Child, all goes to the Uncle (n).

A Nephew by a Brother, and a Nephew by a half Sister, take equally, *per capita* (o).

A Nephew by a deceased Brother, and Nephews and Nieces by a deceased Sister, take equally, *per capita* (p).

If there be only a Brother and a Grandfather, the Brother takes the whole (q).

If the Intestate dies, leaving a Brother's Grandson, and a Brother or Sister's Daughter, the Daughter takes the whole (r).

*640] *If a Bastard dies intestate, or if any other Person having no Wife, Children, or kindred, dies intestate, his effects devolve on the King, who usually makes a grant of them (s).

(m) Durant v. Prestwood, 1 Atk. 455. Lloyd v. Tench, 2 Ves. 213. Page v. Cook, mentioned 2 Ves. 214. contra 1 Domat, Civil Law, 666.

(n) Bowers v. Littlewood, 1 Wms. 593; and see Breton v. Darkin, 2 Vern. 168. Maw v. Harding, 2 Vern. 233.

(o) Stanley v. Stanley, 1 Atk. 456. Davers v. Dewes, 3 P. Wms. 55. Lloyd

v. Tench, 2 Ves. 215. Bowers v. Littlewood, 1 P. Wms. 595.

(p) See the same cases as are referred to in the preceding note.

(q) Evelyn v. Evelyn, 3 Atk. 762. S. C. Ambl. 191.

(r) Pitt's Case, 1 P. Wms. 25.

(s) See 2 Black. Com. 505. Dougl. 542. In regard to Bastards see what is said 2 vol. Life of Sir L. Jenkins, p. 711.

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